The Prosecutor's Manual Volume I
Chapter 1
Defendant's Statements

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I. Introduction

This chapter discusses the admissibility in court of a defendant's pretrial statements. That admissibility will be determined at a voluntariness hearing to determine whether a defendant made his statements voluntarily and in accordance with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

The process is really a three-tiered approach. If a statement is involuntary, it is inadmissible for any purpose. If it is voluntary but in violation of *Miranda*, it may be used for purposes of impeachment only. If it is voluntary and in compliance with *Miranda*, it is admissible in the State's case-in-chief. Cf. *State v. James*, 141 Ariz. 141, 685 P.2d 1293 (1984), *cert. denied* 105 S.Ct. 398.

Admissions of guilt by wrongdoers, if not coerced, are inherently desirable. *Oregon v. Elstad*, 470 U.S. 298, 305, 185 S.Ct. 1285, 1291 (1985), citing *U.S. v. Washington*, 431 U.S. 181, 187, 97 S.Ct. 1814, 1818 (1977), as quoted in *Arizona v. Mauro*, 481 U.S. 298, 107 S.Ct. 1931, 1936 (1987). The failure of a law enforcement official to give Miranda warnings is not, in itself, a violation of the Constitution or coercion. Rather, a presumption is created that "the privilege against compulsory self-incrimination has not been intelligently exercised." *Id*. at 310, 185 S.Ct. 1294. The state can overcome the presumption and any subsequent Mirandized confession can be admitted.

II. "Voluntariness" Hearings

"Before [a defendant's] confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." A.R.S. § 13-3988(A).

A. When Must The Trial Court Hold A Voluntariness Hearing

1. Must Hold Hearing If Requested

The trial court must hold a voluntariness hearing if the defendant requests by motion a hearing at least 20 days prior to trial pursuant to Arizona Rules of Criminal Procedure. However, the trial judge may, in his discretion, "entertain a motion for a voluntariness hearing at trial." *State v. Alvarado*, 121 Ariz. 485, 488, 591 P.2d 973, 976 (1979), citing *State v. Sutton*, 115 Ariz. 417, 565 P.2d 1278 (1977).

2. Hearing Can Be Waived

"The trial judge is not required, *sua sponte*, to enter into an examination outside the presence of the jury to determine possible involuntariness where the question of voluntariness is not raised by either the evidence or the defense counsel." *State v. Finn*, 111 Ariz. 271, 275, 538 P.2d 615, 619 (1974); *State v. Sutton*, 115 Ariz. 417, 565 P.2d 1278 (1977).

The Constitution does not require a court hold a voluntariness hearing absent an objection by the defendant to the admission of a confession. *State v. Fayle*, 134 Ariz. 565, 579, 658 P.2d 218, 232 (App. Div. 1 1982), citing *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977) and *State v. Alvarado*, 121 Ariz. 485, 591 P.2d 973 (1979). Thus, the defendant can waive his right to a hearing by failing to make a timely request. *State v. Wargo*, 140 Ariz. 70, 74, 680 P.2d 206, 210 (App. Div. 2 1984).

However, be aware that the absence of a voluntariness hearing in the first trial may not constitute a waiver of the issue in the second trial on remand. If the defendant requests a voluntariness hearing in the second trial, the fact that the defendant may have waived his right to a voluntariness hearing at the first trial does not discharge the trial court's obligation at the second trial to make a specific determination on the record as to the defendant at the second trial. *State v. Jessen*, 134 Ariz. 458, 461, 657 P.2d 871 ,874 (1982).

3. Waiver Of Part Of Issue

A defendant must state the grounds for a challenge to admissibility of evidence. Any grounds not raised at the hearing, even constitutional grounds, are waived. Thus, where defense counsel objected only to the voluntariness of the statements, but not the Miranda violation, the court need only rule on the voluntariness of the statements. *State v. Tison*, 129 Ariz. 526, 535-36, 633 P.2d 335, 344-45 (1981).

4. Ineffective Assistance Of Counsel

The failure of defense counsel to raise the voluntariness issue at trial is not reversible error unless the defendant can meet the ineffective assistance of counsel standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The defendant must show that his attorney failed to provide competent counsel and, but for his attorney's errors, the outcome of the defendant's trial would have differed. *Id*.

5. Absence From Voluntariness Hearing

The defendant was not prejudiced by his absence from the first day of the voluntariness hearing where his attorney waived his presence and the witnesses who testified on the first day of the hearing were available for cross examination on the second day. Further, the defendant could not demonstrate any prejudice that may have resulted from his absence. *State v. Diaz*, 142 Ariz. 136, 137, 688 P.2d 1028, 1029 (App. Div. 2 1984), aff'd as modified on other grounds, 142 Ariz. 119, 688 P.2d 1011.

6. Witnesses At Hearing

The defendant who confessed over the telephone should have been allowed to call out-of-state witnesses to testify that bad jail conditions and promises coerced the confession. *State v. Piatt*, 132 Ariz. 145, 149, 644 P.2d 881, 885 (1981).

7. Jury Question And Instructions

“While due process will be adequately served if the trial judge alone determines the voluntariness of the confessions, it is the defendant's prerogative to present the issue to the jury if he so determines. The trial court must instruct on voluntariness if the evidence has raised a question for the jury. The trial

court must instruct on voluntariness if the evidence has raised a question for the jury " *State v. Linden*, 136 Ariz. 129, 137-38, 664 P.2d 673, 681-82 (App. Div. 1 1983).

8. Guilty Plea Waives Voluntariness Issue

"It is well established that entry of a valid guilty plea forecloses a defendant from raising non-jurisdictional defects [such as involuntariness of statements]." *State v. Hamilton*, 142 Ariz. 91, 94, 688 P.2d 983, 986 (1984).

B. Burden of Proof

1. Burden is on State

Statements made by a defendant are *prima facie* involuntary. The state bears the burden to demonstrate that any statement it intends to introduce into evidence was in fact freely and voluntarily made once the defendant has moved for a voluntariness hearing. *Ryan v. Superior Court*, 121 Ariz. 385, 387, 590 P.2d 924, 926 (1979); *State v. Fimbres*, 152 Ariz. 440, 733 P.2d 637 (App. Div. 2 1986).

2. Preponderance of the Evidence

The State must prove by a preponderance of the evidence that the statement was voluntary and compliant with *Miranda*. *Lego v. Twomey*, 404 U.S. 477, 93 S.Ct. 619 (1973); *State v. Rivera*, 152 Ariz. 507, 733 P.2d 1090 (1987); *State v. Montes*, 136 Ariz. 491, 496, 667 P.2d 191, 196 (1983). The State must prove that the statement was voluntary and constituted "a knowing and intelligent relinquishment or abandonment of a known right or privilege…" *Edwards v. Arizona,* 451 U.S. 477, 482, 101 S.Ct. 1880, 1883 (1981).

a. Judge Weighs Testimony

The weight to be given to the testimony at the hearing is for the judge. *State v. Mumbaugh*, 107 Ariz. 589, 491 P.2d 443 (1971). The trial judge must look at the totality of the circumstances surrounding the confession. *State v. Hall*, 120 Ariz. 454, 586 P.2d 1266 (1978).

b. Statements for Impeachment

If the defendant's statement is to be used only for impeachment purposes, the court need only find that the statement was voluntary (notwithstanding *Miranda* violations) by a preponderance of the evidence. *State v. Durham*, 111 Ariz. 19, 523 P.2d 47 (1974); *State v. Tison*, 129 Ariz. 526, 633 P.2d 335 (1981). A defendant waives the right to challenge the court's ruling on voluntariness if he does not testify. *State v. Hoskins*, 199 Ariz. 127, 14 P.3d 997 (2000).

c. Same Burden for Questions After Invocation

If law enforcement officers question a defendant knowing he has invoked his Miranda rights and has not been furnished counsel, the state must prove that the defendant initiated contact by a preponderance of the evidence before any subsequent statements are admissible. *Oregon v. Bradshaw*, 462 U.S. 1039, 1043-44 (1983). An explicit statement of waiver is not required. *State v. Jones*, 203 Ariz. 1, 49 P.3d 273

(2002).

Nonetheless, the court may admit a confession obtained after a defendant invokes his right to remain silent and later confesses to a different officer after being re-warned of his *Miranda* rights, if the initial questioning ceased after the defendant invoked his rights, the second officer was not aware that the defendant had previously invoked his right to remain silent, and the court finds the police did not intend to wear down the defendant's resistance to interrogation. *State v. Morgan*, 149 Ariz. 112, 114, 716 P.2d 1049, 1051 (App. Div. 2 1986).

C. Requirement that Trial Court Make a Definite Finding of Voluntariness

The Arizona Supreme Court, citing *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830 (1983), requires judges to state on the record their findings of facts and conclusions of law with regard to voluntariness hearings. *State v. James*, 141 Ariz. 141, 685 P.2d 1293 (1984), *cert. denied* 105 S.Ct. 398.

This section discusses the "magic" words a judge must say in making a ruling at the voluntariness hearing. It is included for your edification and to protect your record. You should ask the court to find that the defendant knowingly, intelligently, and voluntarily waived his right to counsel and that his statements were made voluntarily. If the defendant invoked his rights, you should ask the judge to find that the defendant initiated the second contact or find that an exception to the rule applies. E.g. *State v. Morgan, supra.*

1. Examples of Insufficient Rulings

"Objection overruled. The court finds that there was an intelligent waiver." *State v. Ramos*, 108 Ariz. 36, 39, 492 P.2d 697, 700 (1972).

"I'll admit it." *State v. O'Dell*, 108 Ariz. 53, 58, 492 P.2d 1160, 1165 (1972).

"The defense motion to suppress the statements of the defendant is denied … As I say, it would be up to the jury to determine the facts … on the basis of the evidence which has been presented." *State v. Marovich*, 109 Ariz. 45, 46, 504 P.2d 1268, 1269 (1973).

"What I am indicating is, unless there is some further evidence at this point, I think they have made a *prima facie* showing of the voluntariness of the statement. I am not the one who determines whether it was voluntary. I instruct the jury that they have to do that, but I think the State has made a *prima facie* case of voluntariness." *State v. Costello*, 97 Ariz. 220, 221-22, 399 P.2d 119, 120 (1965).

2. Examples of Sufficient Rulings

Sometimes the Arizona Supreme Court has been willing to uphold the trial court findings even without a specific finding of voluntariness when it was obvious that the trial court understood the requirements of *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964), and "merely worded the ruling badly." *State v. Mincey*, 115 Ariz. 472, 479, 566 P.2d 273 (1977), reversed on other grounds, 437 U.S. 385 (1978).

Although the court did not make a specific finding of voluntariness on the record at the hearing, the court's subsequent statement that he found the defendant's statements were voluntarily made was a

sufficient ruling about the threshold of admissibility. *State v. Dalglish*, 131 Ariz. 133, 137, 639 P.2d 323, 327 (1982).

During the hearing, the trial court stated, "We want to know whether it's voluntary or not … All I'm interested in knowing is whether up to the time that he signed these three statements, did he do so voluntarily?" In his ruling, the trial judge's findings were as follows: "The Court further finds that the defendant was apprised of his Miranda warnings on several occasions and all advised before any statements were made by him, either orally or in writing. The Court further finds that any statements made by the defendant were not induced by any promises of any kind." *State v. Castoe*, 114 Ariz. 47, 53-54, 559 P.2d 167, 173-74 (App. Div. 1 1976).

At the conclusion of the hearing, "the trial judge told the prosecutor to draw up a written finding that the defendant's extrajudicial statements were knowingly and voluntarily made so that he could sign it later. Although no such document appeared in the record … the court's ruling is a definite determination that [the defendant's] custodial statements were knowingly and voluntarily made." *State v. Moore*, 27 Ariz. App. 275, 278, 554 P.2d 642, 645 (App. Div. 1 1976).

3. Procedure When the Trial Court Ruling on Voluntariness is Insufficient

a. Remand for Voluntariness Hearing

When the appellate court finds that the trial court has not made a definite determination of voluntariness, it will remand to the lower court for a hearing on voluntariness. *State v. Jessen*, 134 Ariz. 458, 461, 657 P.2d 871 ,874 (1982). If the trial court finds the defendant's confession to be voluntary, and so rules, it must submit a copy of its minute entry to the clerk of the appellate court." *State v. Dodd,* 101 Ariz. 234, 418 P.2d 571 (1966). If the trial court finds the confession involuntary, it will be directed to enter an order granting the defendant a new trial. *Id*.; *State v. Stevenson*, 101 Ariz. 254, 516 P.2d 591 (1966); *State v. Ramos*, 108 Ariz. 36, 492 P.2d 697 (1972).

b. No Remand Necessary

(1) Harmless Error

Where the allegedly tainted evidence was cumulative and the other evidence was overwhelming, the trial court's failure to make a definite finding on voluntariness was harmless error. *State v. Marovich*, 109 Ariz. 45, 47, 504 P.2d 1268, 1270 (1973).

(2) Miranda Warnings Not Required - Private Citizens

"Even if a defendant is in custody, however, *Miranda* warnings are required when a medical conducts an interrogation only if that medical professional is a state actor." *State v. Sharp*, 193 Ariz. 414, ¶19, 973 P.2d 1171, 1178 (1999).

Where the incriminating statements were made to a security guard who was not required to give Miranda warnings, the trial court's failure to make a definitive determination of voluntariness was not error as there was no issue upon which the court could rule if remanded. *State v. Lombardo*, 104 Ariz. 598, 457 P.2d 275 (1969).

III. **Was the Statement "Voluntary"?**

A. Introduction

The question of whether the defendant voluntarily waived his rights is a two-part question. The first part is whether the defendant voluntarily talked with the officers. The second part of the test is whether the defendant knowingly and intelligently waived his constitutional right to refuse to talk to officers. The second part of this test is discussed in *Section IV, infra*.

"Confessions are involuntary if the court, considering all the circumstances, determines that one of the following factors exists: (1) impermissible conduct by police, (2) coercive pressures not dispelled or (3) confession derived directly from a prior involuntary statement." *State v. Tapia*, 159 Ariz. 284, 288, 767 P.2d 5, 9 (1988), citing *State v. Gretzler*, 126 Ariz. 60, 82, 612 P.2d 1023, 1045 (1980), *cert. denied*, 461 U.S. 971, 103 S.Ct. 2444 (1983) .

B. Voluntariness

A.R.S. § 13-3988(B) provides some of the criteria by which "any self-incriminating statement" must be judged. These include the time between the defendant's arrest and the initial appearance, whether the defendant knew the charges against him, whether he had been given his Miranda warnings, and whether the defendant had received the assistance of counsel when questioned.

These factors are not exclusive and the presence or absence of any of the factors is not conclusive. A.R.S. § 13-3988(B)(5). Additionally, A.R.S. § 13-3988 in no way bars the admission of a statement made when the defendant was not in custody. A.R.S. § 13-3988(C).

In *Schneckloth v. Bustamonte*, the Supreme Court also discussed the criteria by which voluntariness of a confession should be judged. The court wrote:

> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, e.g., *Haley v. Ohio*, 332 U.S. 596, (1948); his lack of education, e.g., *Payne v. Arkansas*, 356 U.S. 560 (1958); or his low intelligence, e.g., *Fikes v. Alabama*, 352 U.S. 191 (1957); the lack of any advice to the accused of his constitutional rights, e.g., *Davis v. North Carolina*, 384 U.S. 737 (1966); the length of detention, e.g., *Chambers v. Florida*, 309 U.S. 227 (1940); the repeated and prolonged nature of the questioning, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); and the use of physical punishment such as the deprivation of food or sleep, e.g., *Reck v. Pate*, 367 U.S. 433 (1961). In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. *Culombe v. Connecticut*, 367 U.S. 568, 603, 81 S.Ct. 1860, 1879 (1961).
>
> The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of

all the surrounding circumstances.

412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973).

In determining whether under the totality of the circumstances the statement was voluntary (that the free will of the defendant has not been overborne), the court considers both the condition of the defendant and the conduct of the interrogator. Cf. *State v. Carillo*, 156 Ariz. 125, 135, 750 P.2d 883, 893 (1988); *State v. Rivera*, 152 Ariz. 507, 733 P.2d 1090 (1987); *State v. Griffin*, 148 Ariz. 82, 713 P.2d 283 (1986); *State v. Cannon*, 148 Ariz. 72, 713 P.2d 273 (1985); *State v. Hensley*, 137 Ariz. 80, 669 P.2d 58 (1983); *State v. Hein*, 138 Ariz. 360, 674 P.2d 1358 (1983).

1. Condition of the Defendant

a. Intoxication or Drug Withdrawal

The mere fact of intoxication does not prevent the admissibility of a statement. If it is shown that the accused was intoxicated to such an extent that he was unable to understand the meaning of his statement, it would be inadmissible.

State v. Arredondo, 111 Ariz. 141, 145, 526 P.2d 163 (1974).

In the instant case, though it is obvious that the defendant was under the influence of alcohol, the testimony of the officers does not indicate that the statements were so influenced by intoxication so as to be involuntary or untrustworthy.

State v. Magby, 113 Ariz. 345, 350, 554 P.2d 1272 (1976).

Even if the defendant is so intoxicated he is later unable to remember what he said, his statements are admissible. Suppression is required only if a defendant is unable to understand what he is saying. Here, the defendant gave accurate personal details and details of the crime, and the statement was admitted. *State v. Woodall,* 155 Ariz. 1, 744 P.2d 732 (App. Div. 1 1987). In *State v. Ferguson,* 149 Ariz. 200, 717 P.2d 879 (1986), the defendant was so drunk, he soiled his pants and kept passing out during *Miranda,* so police let him sleep it off. The next morning he appeared normal, walked, climbed stairs and could calculate the time difference between states. His statements were admissible.

The defendant, who had been drinking all day, killed his wife. He was later stopped for D.W.I. Upon seeing blood on the defendant's shirt, the officer asked where it came from. The defendant responded that his wife had her teeth pulled and had been crying on his shoulder. A breathalyzer test showed a reading of .38%. "Certainly, any man who can manufacture the (above) excuse. . . has the control over his mental facilities to understand what he is saying." *State v. Clark,* 102 Ariz. 550, 553, 434 P.2d 636, 639 (1967); *State v. Rivera,* 152 Ariz. 507, 733 P.2d 1090 (1987); *State v. Hicks,* 133 Ariz. 64, 649 P.2d 276 (1982) (.26%, defendant confused his name and victim's name, was nevertheless in control, statements voluntary).

The defendant, while being interrogated at the jail, was withdrawing from heroin. Doctors and officers testified that his symptoms were minor and that he "appeared to be in control of himself and his surroundings." (Voluntary.) *State v. Steelman,* 120 Ariz. 301, 311, 585 P.2d 1213, 1223 (1978).

"The test for voluntariness in cases where a defendant is under the influence of narcotics or has mental disabilities is whether these problems render him unable to understand the meaning of his statements." The court here rejects defendant's claim of involuntariness due to ingestion of large amounts of thorazine. *State v. Clabourne,* 142 Ariz. 335, 342, 690 P.2d 54, 61 (1984).

Defendant was too intoxicated to understand the initial reading of his *Miranda* rights. It was not an impermissible resumption of questioning to later reread defendant his rights and question him after a waiver of those rights. *State v. Ferguson,* 149 Ariz. 200, 717 P.2d 879 (1986).

b. Wounded

Defendant was seriously injured in a shootout with narcotics agents. After being taken to the intensive care unit, tubes were inserted in his throat and nose, he was drugged, fed intravenously and in great pain. A homicide detective visited the defendant a few hours after arrival and took a statement, despite defendant's repeated requests for an attorney. The statement was involuntary because "Mincey was weakened by pain and shock, isolated from family, friends and legal counsel and barely conscious, and his will was simply

overborne." *Mincey v. Arizona,* 437 U.S. 385, 401-402, 98 S.Ct. 2408, 2418 (1978).

Mincey was distinguished in *State v. Rodriquez,* 137 Ariz. 168, 669 P.2d 601 (App. Div. 2 1983). Rodriquez was injured, but his injuries did not require hospitalization, he did not request the interrogation stop, and he was not heavily sedated. His statements were voluntary.

Defendant was shot while he was in a bar. An officer secured first aid and was informed by a medic that the defendant was not in shock. Warnings were given; rights were waived. The officer then asked, "What happened?" and defendant made admissions. "The defendant was alert, coherent and fully understood his constitutional rights." *State v. Goff,* 25 Ariz.App. 195, 197, 542 P.2d 33, 35 (App. Div. 1 1975).

c. Low Intelligence

Even if defendant's insanity forces him to confess, his statement is admissible, unless there is police misconduct. "Coercive police activity is a necessary predicate" to finding a confession involuntary. *Colorado v. Connelly,* 479 U.S. 157, 157, 107 S.Ct. 515, 516 (1986).

There is no right to have counsel present during a psychiatric examination. The right of counsel extends only to helping the defendant formulate his approach to the examination. *State v. Turrentine,* 152 Ariz. 61, 730 P.2d 238 (Ariz.App. 1986).

Conflicting testimony about defendant's IQ is for the court to resolve. *State v. Guillen,* 151 Ariz. 115, 726 P.2d 212 (App. Div. 2 1986).

"Low intelligence is not a controlling criterion that would negate an otherwise voluntary and intelligent waiver." *State v. Drury,* 110 Ariz. 447, 455, 520 P.2d 495, 503 (1974).

Defendant was 23, had an eighth grade education and was of low intelligence, " but there [was] no showing that his intelligence was so low as to affect his ability to understand what he was doing." *State v. Humphrey,* 23 Ariz.App. 204, 206, 531 P.2d 1142, 1144 (App. Div. 1 1975).

The testimony of three of defendant's former teachers concerning his learning problems and propensity to merely parrot back what was said to him did not establish mental deficiency sufficient to render the taped confession involuntary. *State v. Adams,* 145 Ariz. 566, 703 P.2d 510 (App. Div. 2 1985).

Defendant's invocation of his rights could be used to show he understood his rights, after he claimed statements previous to the invocation were involuntary because of his retardation. *State v. Carillo*, 156 Ariz. 125, 750 P.2d 883 (1988).

Suspect's young intellectual age and cognitive difficulties generally not relevant to voluntariness unless police knew or should have known about them. *State v. Blakely*, 204 Ariz. 429, 65 P.3d 77 (2003).

d. Prison or Jail Conditions

Defendant's free will was not overborne by restriction to solitary confinement at Arizona State Prison. No desserts, T.V. or radio, exercise and showers only three times a week and temperatures in the 80' - 90' ranges were not enough to overbear his will. *State v. McVay,* 127 Ariz. 18, 617 P.2d 1134 (1980); *but see generally State v. Piatt,* 132 Ariz. 145, 644 P.2d 881 (1981) (a promise of a change from solitary to general population might overbear will; a promised successful "suicide" certainly would).

Conditions of confinement can be coercive if free will is overcome and renders the confession involuntary, but mere uncomfortable surroundings insufficient. *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996).

e. Coerced Confession by Civilian

A prior confession to a civilian does not affect a later confession to police if police take all usual and necessary precautions. A confession to a private individual does not require a *Miranda* warning, but must still be voluntary to be admissible. *State v. Cabrera,* 114 Ariz. 233, 560 P.2d 417 (1977).

f. Agitated Mental State

Defendant's "agitated mental condition," which resulted from questions asked by officers concerning a rape, did not produce a coercive atmosphere that rendered defendant's confession involuntary. *State v. Williams,* 136 Ariz. 52, 56, 664 P.2d 202, 206 (1983).

g. Plea Negotiations

The state is precluded from using any statements during plea negotiations so as to promote candor, but it is not intended as a shield from giving false information to law enforcement for a better plea. *State v. Campoy,* 220 Ariz. 539, 207 P.3d 729 (App. Div. 2 2009).

2. Conduct of the Officers

Prior to the *Miranda* decision, *supra,* the voluntariness of a statement was determined solely under the due process clause of the Fourteenth Amendment. Traditionally, the purpose of suppression was based upon the inherent unreliability of a confession which was obtained by physical abuse or long interrogation. *Brown v. Mississippi,* 297 U.S. 278 (1936). The focus later shifted to deterrence and refusal of the court to condone heavy-handed police practices. *Rogers v. Richmond,* 365 U.S. 534 (1961). The courts have occasionally, but dangerously, ruled involuntary what would appear to be a perfectly "reliable" confession obtained by virtue of very minor misconduct by the officers involved. *See, e.g., Denny, infra.* The Supreme Court's present treatment of *Miranda* is exemplified in the following quote:

> Because *Miranda* warnings may inhibit persons from giving information, this Court has determined that they need be administered only after the person is taken into "custody" or his freedom has otherwise been significantly restrained. Unfortunately, the task of defining "custody" is a slippery one, and "policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Oregon v. Elstad, 470 U.S. 298, 309, 105 S.Ct. 1285, 1293 (1985) (internal citations omitted).

The United States Supreme Court's preference for confessions was best expressed when they overruled an Arizona Supreme Court decision which had suppressed the confession of a child-killer. "[F]ar from being prohibited by the constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *Arizona v. Mauro*, 481 U.S. 520, 529, 107 S.Ct. 1931, 1936 (1987).

a. Mental Pressure

(1) Statement Suppressed

Based upon information from an unreliable informant the defendant was stopped and questioned several times about a brutal murder. The defendant on several occasions requested an attorney but officers ignored these requests. The defendant's confession was suppressed because:

> . . . detectives used a variety of plays: aggressive domination; sympathy; the common bond of womanhood between a female officer and Edwards; minimizing the moral seriousness of the charge; minimizing the use and necessity of attorneys; threats of psychiatric examinations and commitment; a self-defense rationalization; grim pictures; illegally obtained evidence indicative of guilt; et cetera.

State v. Edwards, 111 Ariz. 357, 361, 529 P.2d 1174, 1178 (1974).

Coercion need not be physical. Defendant's convictions for first degree murder, second degree burglary, aggravated assault and armed robbery were reversed. "Even if…the conversation regarding the gas chambers was initiated by appellant, the absence of any recording of these events is too convenient for the state's case." Thus, defendant's statements were involuntary and inadmissible since the officers "should have known" their conversation about the death penalty was reasonably likely to elicit an incriminating response after the defendant had asserted his right to an attorney. *State v. Emery*, 131 Ariz. 493, 502-03, 642 P.2d 838, 847-48 (1982).

During a juvenile parole board hearing, the defendant invoked his right to remain silent. The board immediately recessed and the juvenile's probation officer was brought in. After discussions with the officer, the juvenile made a statement to the court. "It strains belief to maintain that the subsequent giving of a confession was a free and voluntary act as has been defined in *Miranda* and *Edwards*." *Appeal in Maricopa County Juvenile Action No. J-88515*, 139 Ariz. 260, 263, 678 P.2d 445, 448 (1984).

(2) Statement Admitted

Defendant invoked his rights, but officers continued peripheral questioning, asserted defendant had nothing to lose by confessing because he was going to get a long sentence anyway and "laid a guilt trip" on defendant by saying the rape victims needed to stop looking over their shoulder. Defendant again invoked his rights and the officers stopped questioning him. During the next hour, officers and defendant tried to take him back without further questioning and defendant confessed to one of the rapes. Given the defendant's prior criminal history, the court found defendant's statements voluntary and not the result of the illegal questioning. *State v. Ferreira*, 152 Ariz. 289, 291, 731 P.2d 1233, 1235 (App. Div. 2 1986).

The mere fact that defendant was left naked for over seven hours after his strip search incident to arrest at a shoot-out where his brother was killed did not make his statements involuntary. Before each of his interrogations, he was read his rights and he was not threatened in any way. *State v. Tison*, 129 Ariz. 526, 633 P.2d 335 (1981).

It was not coercion or pressure to tell the defendant that a co-defendant had turned state's evidence and implicated the defendant in the murder. The defendant was fully apprised of his rights and made a voluntary waiver. *State v. Smith*, 138 Ariz. 79, 673 P.2d 17 (1984); *State v. Ferguson*, 149 Ariz. 200, 717 P.2d 879 (1986).

"A defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted. . . .[However, if defendant] chooses to answer…his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so." *Minnesota v. Murphy*, 465 U.S. 420, 420, 426, 104 S.Ct. 1136, 1138-39, 1141-42 (1984). The probationer could have avoided divulging the incriminating evidence by invoking the Fifth Amendment protections. Thus, answers given by a probationer to his probation officer, which were required under the rules of probation, could be

used against him in a criminal proceeding because they were voluntary.

No parent was present, the officer lied about evidence, he was allegedly threatened, but there was no evidence presented that his will was overborne. No single fact is enough—key is whether will was overborne. *State v. Huerstel*, 206 Ariz. 93, 75 P.3d 698 (2003).

Telling the defendant that "everybody has to answer to God for what they do and how did [he] think he would answer to God about this." did not render the confession inadmissible. *State v. Adams*, 145 Ariz. 566, 569, 703 P.2d 510, 513 (App. Div. 2 1985) (NOT recommended procedure).

b. Promises

A confession resulting from a promise is involuntary if (1) police make an express or implied promise, and (2) the defendant relies on that promise in confessing. *State v. Blakely*, 204 Ariz 429, 65 P.3d 77 (2003).

(1)No Promises

Defendant asked if police would release his girlfriend if he talked, police said they had no reason to hold an innocent person; no promises were made. *State v. Dalglish,* 131 Ariz. 133, 639 P.2d 323 (1982).

Defendant was caught when he tried to sell stolen jewelry. After warnings and waiver, officers apparently told defendant that if he confessed to some burglaries to "clear paper" he would not be charged but as to some others (where the evidence was stronger) no promises were made. Defendant later contended that he thought no charges would be brought. Officers, however, testified there were no promises regarding three of the confessions. The Appeals Court found, given all the other evidence which the police had against the defendant, ". . . it would be unrealistic and unreasonable to infer that the defendant harbored such a belief." *State v. Castoe*, 114 Ariz. 47, 53, 559 P.2d 167, 173 (App. Div. 1 1976).

The detective continued to question the defendant after he invoked his right to remain silent. The following conversation occurred:

> DET: Alright, you've already told me you don't want to talk to me anymore about what you did and I'm not going to ask you anything else about what you did from this point on.
>
> DEF: Okay.
>
> DET: And even if I did, it wouldn't be admissible in court. You know enough about the law to know that, don't you?
>
> DEF: Yes.
>
> DET: Once you said you don't want to talk to me about that, anything else you tell me can't be used against you. So anything you tell me from this point on is, you know, can't be held against you.
>
> THE COURT: While we strongly disapprove of continued questioning after a suspect has invoked his rights, we do not believe that [the detective's] statements constituted a "promise" within the scope of Arizona decisions. The statements did not offer any benefit to the defendant in exchange for information.

Defendant's statements were suppressed on other grounds. *State v. Hensley*, 137 Ariz. 80, 87, 669 P.2d 58, 65 (1983).

Where defendant makes the offer in exchange for his confession, there is no promise which induced his actions or interfered "with his free exercise of volition." Thus, defendant's claim that he relied on a

promise that he would be able to serve his sentence out of state was rejected. *State v. Williams*, 136 Ariz. 52, 56, 664 P.2d 202, 206 (1983).

Defendant's statements were voluntary where the officer testified that she had been taught never to promise anything to anyone prior to a confession. The defendant contended that he had been promised a light sentence (referral to a treatment program) in exchange for his confession. The officer testified that she did not make the statement prior to defendant's statement. *State v. Spence*, 146 Ariz. 142, 704 P.2d 272 (App. Div. 2 1985).

Defendant was arrested at 2:41 a.m. for armed robbery, taken to the scene, identified and was then taken to the station. Over a four hour period, he was given his rights four times and denied involvement. During the course of one session, an officer said if he confessed and cooperated "'it would possibly have an effect on the sentencing' and 'all this is taken into consideration normally when the judge and presentence investigator determine the sentencing. . . they notify us and ask our opinion.'" He also said armed robbery carries a mandatory five-year sentence and that no deals can be made. Later, while another officer was questioning the defendant, the officer said he was concerned about kids finding the gun and hurting themselves. The defendant responded that the gun wasn't loaded. The defendant then confessed. The court found that in light of the fact the officer said the sentence was mandatory and no deals could be made, no promises were made and that because the defendant made no statement in response to the alleged promises he could not have relied on the officer's "promises". Even if a promise is made, defendant must rely on the promise before his confession is inadmissible. *State v. Hall*, 120 Ariz. 454, 456, 586 P.2d 1266, 1268 (1978).

The officer told defendant that the first degree murder was not defendant's fault, but that "it [was] all that drinking and all the other bull shit." The officer said, "Look partner It's too late to lie" and that confessing would make the defendant feel a whole lot better, and that he would have to go to court with only the story of the confessing accomplice. The trial court did not abuse its discretion in admitting the confession. *State v. Ferguson*, 149 Ariz. 200, 207, 717 P.2d 879, 885 (1986).

Defendant, accused of rape of a minor, was told by officers that his truthful answers might make a difference between whether he was charged with first or second degree rape. The court did not consider this a promise. *State v. Smiley*, 27 Ariz.App. 314, 554 P.2d 910 (App. Div. 1 1976).

State v. Steelman, 120 Ariz. 301, 310, 585 P.2d 1213 (1978); *State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023 (1980).

Defendant waived rights and was told by an officer that he had probable cause to arrest for various sexual crimes without asking any questions. Defendant then responded to officer's questions admitting that he had molested victim but denied that he raped her. Officer later testified that he did not arrest defendant immediately so as to "get any statements I can, any incriminating statements and to continue with the investigation before placing him (the defendant) under arrest because I like to hear both sides of the story." The defendant contended that the officer's tactics led the defendant to believe that an arrest would not be made if he (the defendant) cooperated. Court said no promises were made. *State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979).

The defendant, who was in custody at jail and who had already been sentenced on a robbery charge, was approached by a detective and read his rights. The detective told the defendant that the robbery sentence was not severe enough, that he knew the defendant had used the credit card and that he was "going to give (him) more time." The detective also "suggested" that he talk about the card and that "it would be helpful if he talked." Not a promise. *State v. Valenzuela,* 109 Ariz. 1, 2, 503 P.2d 949, 950 (1973).

(2) Promises

Detectives promised defendant he would not be prosecuted for certain crimes if he helped them by

confessing to several other unsolved sex crimes. The defendant was not prosecuted for the crimes, but the sentencing judge used them in determining the sentence. The "confession" was a result of a promise and clearly involuntary. Use for sentencing purposes was also prohibited even though a sentencing judge usually has wide discretion in considering information in imposing sentence. *State v. Conn*, 137 Ariz. 148, 669 P.2d 581 (1983).

The detective's statement, "I'm not going to arrest you or put you in jail or anything . . ." carried a clear implication that defendant would not be arrested if he disclosed…details" to the police. It was therefore reversible error to admit the conversation. *State v. Burr,* 126 Ariz. 338, 615 P.2d 635 (1980).

(3) Personal Reasonable Belief

When a defendant reasonably believes that a promise has been made to him, even though no such promise in fact has been made, and this belief induced his statement, the statement cannot be considered voluntary. *State v. McFall*, 103 Ariz. 234, 439 P.2d 805 (1968).

(4) Possibilities and Personal Opinions

Clearly labeled personal opinions or expressions of possibilities logically are not promises. See *State v. McVay*, 127 Ariz. 18, 617 P.2d 1134 (1980).

However, in context they may be taken as promises. A deputy arrested defendant and was transporting him from the military base where defendant served. The defendant said it looked like many years down the drain and the deputy agreed, saying that in his experience defendants never won on child molesting charges. The defendant testified, and the deputy did not deny, that the deputy told defendant of a program where a defendant could get probation if he confessed. Defendant said his daughter was telling the truth, then said he recanted the confession. Again the officer testified that he couldn't remember and it could have happened that way. The Arizona Supreme Court found the confession was involuntary because of promises. *State v. Thomas*, 148 Ariz. 225, 714 P.2d 395 (1986).

(5) Defendant Initiates Promises

Defendant cannot complain of promises offered when he initiates the deal. Here defendant called the guard and asked if he would be let out of solitary if he talked. The guard said he would relay that to the warden and release was a possibility. No promise made. *State v. McVay*, 127 Ariz. 18, 617 P.2d 1134 (1980).

"In the instant case, the record is clear that the offer of assistance was solicited by the defendant. He cannot now argue that he was the victim of the prosecutor's compelling influence." *State v. Williams*, 136 Ariz. 52, 56, 664 P.2d 202, 206 (1983). See *State v. Dalglish,* 131 Ariz. 133, 639 P.2d 323 (1982).

c. Deceit

"A statement induced by fraud or trickery is not made involuntary unless there is additional evidence indicating that the defendant's will was overborne or that the confession was false or unreliable." *State v. Winters*, 27 Ariz.App. 508, 511, 556 P.2d 809, 812 (App. Div. 1 1976). Ruses are part of law enforcement, and confessions are voluntary as long as the defendant's will was not overborne. *State v. Carillo*, 156 Ariz. 125, 750 P.2d 883 (1988).

In *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986), the Supreme Court determined that the failure to tell the defendant an attorney had been retained by his sister and the attorney had contacted the police was not a violation of *Miranda* and was not deceit which would render the statement involuntary. The fact an attorney was available was not information necessary to the decision to waive his rights and make a statement.

Defendant had been warned several times and could make a knowing and intelligent waiver of the right to remain silent and the right to an attorney. Further, *Miranda* was never intended to extend to the attorney representing the client. (Police lied to the attorney about whether defendant was being questioned.)

The United States Supreme Court held police do not have to tell a defendant the crimes they want to ask questions about. The court refused to invalidate two written and one oral waivers of *Miranda* where a defendant was arrested and questioned about a firearms violation, then was asked about a murder. *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851(1987).

Defendant was arrested ten days after a robbery on an informant's tip. After fingerprinting, an officer told the defendant he was going to compare the prints. The officer returned, said the prints matched (when officer knew they did not), and the defendant confessed. Voluntary. *Winters, supra.*

Defendant was held seven hours in middle of the night for questioning and during the course of the interrogation was told his prints were found in the victim's home which was, in fact, untrue.

> Looking to the totality of circumstances, as we must, *State v. Knapp,* 114 Ariz. 531, 562 P.2d 704 (1977), we do not find that defendant's will was overborne and his capacity for decision diminished. *State v. Edwards, supra.* He was a twenty-year-old high school graduate, with previous experience in the receiving end of criminal investigation. He was alert enough to manufacture two stories with regard to his participation in the crime before finally making his confession. With regard to the police lie to appellant that is just one circumstance to consider under the totality of circumstances test, and that factor alone cannot make an otherwise voluntary confession involuntary. *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). The trial court did not err in failing to suppress the defendant's confession.

State v. Cobb, 115 Ariz. 484, 490, 566 P.2d 285, 291 (1977).

Defendant was told by officers that her husband was going to live when, in fact, the officers knew he was dead. The defendant then confessed. The trial court found the statement involuntary but allowed the prosecutor to use the statement for impeachment when the defendant took the stand. The Court of Appeals reversed by reason of the fact that involuntary statements become untrustworthy and cannot be used for any purpose at trial. The Court then, in dicta, stated its agreement with the trial court's finding that the statement was untrustworthy. *State v. Denny*, 27 Ariz.App. 354, 555 P.2d 111 (App. Div. 1 1976).

Defendant was not tricked into confessing when he was interviewed by a female police officer. Defendant contended that since the police knew of his propensity to discuss sexual matters with females, the situation was one likely to induce incriminating statements. The court found no deliberate scheme on the part of the police. The statements were properly admitted. *State v. Williams*, 136 Ariz. 52, 664 P.2d 202 (1983).

Police may lie about evidence connecting a suspect to a crime so long as the suspect's will is not overborne. *State v. Huerstel*, 206 Ariz. 93, 75 P.3d 698 (2003).

d. Protection of a Loved One

The issues involved when a defendant alleges that he confessed to protect a loved one are:

(1) Whether the officer or the defendant initiated the conversation about his loved one.

(2) Whether the defendant had waived his rights, not been warned, or had refused to waive his rights.

(3) Whether officers are honest with the defendant.

Defendant's wife was also a murder suspect where unidentified prints had been found at the scene and an accomplice had implicated her. After waiver, defendant initiated a conversation regarding what was going to happen to his wife. Officers told the defendant that his wife would be released if there appeared to be no evidence to hold her. Defendant later said in his statement that his confession was voluntary. The Supreme Court affirmed the statement's admissibility. *State v. Ferguson*, 119 Ariz. 55, 579 P.2d 559 (1978). *State v. Dalglish*, 131 Ariz. 133, 639 P.2d 323 (1982) (girlfriend). *See also State v. Knapp,* 114 Ariz. 531, 562 P.2d 704 (1977).

In *State v. Hanson*, 138 Ariz. 296, 674 P.2d 850 (App. Div. 2 1983), the court held that implied threats to the wife, which were denied by the police, were issues to be determined by the trial court in resolving factual differences.

e. Length of Interrogation

Defendant was caught stealing from cars and interrogated intermittently from 2:30 a.m. till 9:00 a.m. "There is no indication appellant was denied food, or that his will was in any way overborne by the occasional questioning during this period." *State v. Calvery*, 117 Ariz. 154, 158, 571 P.2d 300, 304 (1977). See also *State v. Linden*, 136 Ariz. 129, 664 P.2d 673 (App. Div. 1 1983); *State v. Poyson*, 198 Ariz. 70, 7 P.3d 79 (2000).

f. Miranda Warnings

"In assessing the totality of circumstances in the instant case, we note that the defendant was advised of his *Miranda* rights, he stated that he understood those rights and wished to waive them, there is no evidence of physical mistreatment, and there is no evidence of mental duress." *State v. Drury*, 110 Ariz. 447, 455, 520 P.2d 495, 503 (1974).

Defendant was given his *Miranda* warnings at the scene and again at the police station before questioning. He stated he understood his rights and agreed to talk to the interrogating officers. In the totality of the circumstances analysis, the court pointed out the defendant's prior history of contact with the police and familiarity with the *Miranda* warnings and that the statements were recorded. The defendant also answered the question on whether the confession was of his own free will by saying he wanted to get the incident off his chest. The statements were voluntary and admissible. *State v. Cannon*, 148 Ariz. 72, 713 P.2d 273 (1985).

More specifically, to determine if the defendant has voluntarily knowingly, and intelligently waived his *Miranda* rights, the state must establish (1) that the relinquishment of the right was a product of deliberate choice rather than intimidation, coercion and deception, and (2) that the defendant had a full awareness of both the nature of the right and the consequence of abandoning it. *In re Andre M.*, 207 Ariz. 482, 88 P.3d 552 (2004).

g. Physical Abuse

To determine voluntariness, the appropriate question is whether, under a totality of circumstances, the statement was a product of coercive police tactics. *State v. Lee*, 189 Ariz. 590, 944 P.2d 1204 (1997).

Defendant was caught coming out of a burglarized house. When he failed to lie still on the ground, a later demoted sergeant struck him one to six times on his head with the officer's flashlight. Defendant responded, "All you've got me on is criminal trespass." The Court of Appeals suppressed the statement, saying when a statement is made in response to police brutality, it should be suppressed. *State v. Britain*, 156 Ariz. 384, 385, 752 P.2d 37, 38 (App. Div. 2 1988).

It was undisputed that police had beaten and threatened to kill defendant while he was handcuffed and had a

towel covering his face before interrogating him. The confession was clearly involuntary and inadmissible. *State v. Tom*, 126 Ariz. 178, 613 P.2d 842 (App. Div. 2 1980).

When there is conflicting evidence, the trial court's determination that defendant's statements were voluntary will not be disturbed on appeal absent substantial evidence. *State v. Brooks*, 127 Ariz. 130, 618 P.2d 624 (App. Div. 1 1980).

h. When to Rewarn

Absent circumstances suggesting the defendant is not fully aware of his *Miranda* rights, there is no obligation to repeat them. The defendant's rights were not violated when *Miranda* rights were not repeated during a seven hour interview with three separate sessions, even if the defendant never waived his rights, did not hesitate to answer questions, and did not ask for an attorney. *State v. Trostle*, 191 Ariz. 4, 951 P.2d 869 (1997).

IV. WAS THE STATEMENT TAKEN IN VIOLATION OF *MIRANDA*

A. Were *Miranda* Warnings Required

Miranda warnings are required prior to "custodial interrogation" of a suspect. "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966).

> Because *Miranda* warnings may inhibit persons from giving information, this Court has determined that they need be administered only after the person is taken into "custody" or his freedom has otherwise been significantly restrained. Unfortunately, the task of defining "custody" is a slippery one, and "policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Oregon v. Elstad, 470 U.S. 298, 309, 105 S.Ct. 1285, 1293-94 (1985) (internal citations omitted). *Accord State v. Montes*, 136 Ariz. 491, 667 P.2d 191 (1983); *State v. Stuck*, 154 Ariz. 16, 739 P.2d 1333 (App. Div. 1 1986).

Once a defendant has been warned "[f]urther warnings are not required in the absence of circumstances between the arrest and interrogation [or between the first interrogation and the second] which would alert officers that the accused may not be fully aware of her rights." *State v. Noriega*, 142 Ariz. 474, 480, 690 P.2d 775, 781 (1984). This passage from *Noriega* was quoted and relied on in *State v. Castenada*, 150 Ariz. 382, 724 P.2d 1 (1986).

1. Custody

In the vast majority of cases where statements are taken without the giving of *Miranda* warnings the crucial issue is whether the suspect is in custody.

The test for custody in Arizona is ". . . would a reasonable man feel that he was deprived of his freedom of action in any significant way . . .." *State v. Hatton*, 116 Ariz. 142, 146, 568 P.2d 1040, 1044 (1977); *State v. Perea*, 142 Ariz. 352, 690 P.2d 71 (1984).

A police officer's uncommunicated subjective intent not to let defendant go does not constitute custody. *State v. Morse*, 127 Ariz. 25, 617 P.2d 1154 (1980).

a. At Home

The funniest try at getting statements suppressed is *State v. Sands*, 145 Ariz. 269, 700 P.2d 1369 (App. Div. 2 1985). Police officers did not have to give defendant *Miranda* even though they were talking to and trying to arrest defendant. Defendant was armed in his own home, was shooting at police, had hostages and was talking to police over the phone. Somehow the court had trouble finding that defendant was in custody.

Another such case is *State v. Long*, 148 Ariz. 295, 714 P.2d 465 (App. Div. 2 1986). Police responded to a burning home and a suicidal man standing at the edge of a cliff. While trying to talk him down, they asked him what happened. He said if he wanted to burn his own house down he would. Police did not have to give him *Miranda* before asking him what happened.

Defendant's statements to the police made in his home were admissible because he was not in custody and *Miranda* warnings were not required. The defendant claimed that since he was the focus of the inquiry and was the only possible suspect at the time of the questioning, warnings were required. The court rejects this argument. Neither the form of the questioning nor the site of the questioning "had the objective indicia of arrest." *State v. Thompson*, 146 Ariz. 552, 554, 707 P.2d 956, 958 (App. Div. 2 1985) (officers responded to hospital's suspicion of child abuse/murder).

Defendants hired a former employee to murder defendants' partner so they could take over the business. The employee was "wired" during subsequent conversations with the defendants. At one of these conversations, defendants told the employee that an "alibi party" was going to be held by the defendants on the night of the murder. Plainclothes officers went to the party and told the defendants that the victim had been murdered, etc. The conversation, in which incriminating statements were elicited, took place beside the pool with others standing around. Although the officers clearly had probable cause prior to the questioning, the Supreme Court held:

> Custody is an objective condition. The subjective intent of the interrogator to arrest the suspect is not, in itself, a sufficient basis upon which to conclude that custody exists.
>
> When an arrest has not yet taken place, the factors to be considered in deciding whether the custody has attached are many. Among the most important are:
>
> (a) the site of the interrogation;
>
> (b) whether the investigation has focused on the suspect;
>
> (c) whether the objective indicia of arrest are present; and
>
> (d) the length and form of the interrogation.
>
> Under the facts here, there was no custodial interrogation and the *Miranda* warning was not necessary.

State v. Kennedy, 116 Ariz. 566, 569, 570 P.2d 508, 511 (1977). *See also State v. Carter*, 145 Ariz. 101, 700 P.2d 101 (1985) (defendant invited officers into his home, freely accompanied them to the station for fingerprinting

and photographs, and made several contradictory statements concerning his whereabouts on the afternoon of the robbery).

The defendant showed officers the bath house where two young boys had been found murdered. Defendant had been drinking for ten hours but discussed the case extensively in his home with his family present. The conversation was admissible even though no warnings had been given because the defendant was not in custody. *State v. Hatton*, 116 Ariz. 142, 568 P.2d 1044 (1977).

The defendant was suspected of burglarizing a city maintenance yard. Officers went to the suspect's home, found stolen property in the defendant's room, and asked the suspect's father if he would question the suspect about the burglary. The suspect admitted the burglary and theft. "There is nothing in the record before us to show any restraint on the appellant. To the contrary, the questioning took place in appellant's home by his father. Appellant was free to leave the scene and refuse to talk to his father at all. The fact that the father questioned the appellant rather than the officer is of no importance. There was no restraint placed on the appellant and his statements were admissible." *State v. Moreno*, 27 Ariz.App. 460, 556 P.2d 14 (App. Div. 1 1976) (another case where probable cause was established prior to questioning).

The defendant was not in custody where officers came to the home with the purpose of arresting him, the police did not indicate they were there to arrest before the statements were made, they did not draw weapons or handcuff him, but said they were investigating before the defendant voluntarily spoke. *State v. Smith*, 197 Ariz. 333, 4 P.3d 388 (App. Div. 2 1999) (abrogated on other grounds).

b. At the Police Station

Police used a ruse to get a retarded defendant down to the station took his fingerprints and photographs without getting consent explicitly. Police testified they lacked probable cause to arrest defendant, they expressly told him he was not under arrest, and the interrogation lasted only ninety minutes. Police did not have to give defendant *Miranda* until he admitted the murder. *State v. Carillo*, 156 Ariz. 125, 750 P.2d 883 (1988).

Defendant was not in custody merely because he asked what would happen if he refused to come to the station and voluntarily give a handwriting sample, and the officer said he would get a court order. The officer could have gotten an A.R.S. § 13-3905 order. Defendant was not in custody when he confessed at the station. *State v. Livanos*, 151 Ariz. 13, 725 P.2d 505 (App. Div. 1 1986).

Defendant was not in custody although the interview took place at the station. Defendant voluntarily came down to the station and left when the interview was over. *State v. Perea*, 142 Ariz. 352, 690 P.2d 71 (1984).

There was no interrogation or coercion where the police tape recorded a conversation between defendant and his girlfriend in the police interview room. The girlfriend did not interrogate him and the police did not expect the defendant to confess to her during the conversation. *State v. Hauss,* 142 Ariz. 159, 688 P.2d 1051 (App. Div. 2 1984). If someone cites *State v. Mauro*, 149 Ariz. 24, 716 P.2d 393 (1986), in response to *Hanss*, *Mauro* was reversed by the United States Supreme Court. *Arizona v. Mauro*, 481 U.S. 520, 107 S.Ct. 1931 (1987).

Defendant was not in custody when he walked into the police station and stated he had just attacked his children with a hatchet. Thus his incriminating statements made at the station and at his home during a cursory examination to confirm his story were properly admitted. *State v. Barnes,* 124 Ariz. 586, 606 P.2d 802 (1980).

Officers asked the suspect to come to the station to talk about a strangled girl he had been seen with on the night of the murder. Suspect drove his car to the station, signed in as a visitor, and was not given his

Miranda warnings. Although the officer interviewed the suspect for six hours, the suspect went out for breakfast and waited to take a polygraph during this period. The suspect was not in custody. *State v. Garrison*, 120 Ariz. 255, 585 P.2d 563 (1978).

The defendant called the police and told them he had found a dead girl. Later, he explained how he had found the body. The next day a detective questioned the defendant at his home. Two days later, the detective again questioned defendant in his home. That afternoon, the defendant was requested to go to the police station and then to the crime scene for a walk-through. Officers asked the suspect for his prints and shoes for elimination purposes. That night, the detective picked up the clothes the defendant was wearing on the night of the murder. Very minor inconsistencies were developing in the defendant's stories. Five days later, officers asked the defendant to come to the station for questioning. After the defendant again gave his story, the officers confronted defendant with the inconsistencies in his story and said that because of those inconsistencies, they would give him his *Miranda* rights. After the defendant waived his rights, the officers went through the inconsistencies. The defendant first changed his story to meet the inconsistencies. An officer then said, "Now David, now is the time when you are going to have to stand on your own two feet and straighten up your own problems. It's going to be up to you. Nobody else is going to straighten up your problems for you." The court found that the defendant was not in custody at the outset of the last interrogation. "There is no rule that we must make police house interrogations a *per se* violation." *State v. Mumbauqh*, 107 Ariz. 589, 592, 595, 491 P.2d 443, 446, 449 (1971).

Defendant's confession was not involuntary merely because he was questioned by the police prior to being given *Miranda* warnings. He voluntarily accompanied the officer to the station, the interrogation was conducted in Spanish, defendant was not booked, no weapons were drawn, and defendant was not restrained. When defendant said he knew something about the murder, the police gave him *Miranda* warnings. *State v. Cruz-Mata*, 138 Ariz. 370, 674 P.2d 1368 (1983).

Defendant was taken to police station pursuant to detention order which allowed police three hours to obtain physical samples when he was placed in a bugged room and interviewed—he was in custody and required Miranda warnings. A reasonable person in defendant's position would have believed he was in custody. *State v. Rodriguez,* 186 Ariz. 240, 921 P.2d 643 (1996).

c. Over the Phone

Defendant burglarized the victim's home and stole a TV. A neighbor saw the defendant wipe prints off a doorknob and copied the defendant's license number. Defendant turned out to be a friend of the victim's boyfriend. The victim, at the suggestion of the police, called the defendant and told him she would call the police if he didn't bring the TV back. *Miranda* warnings were unnecessary (even if the victim was an agent of the police) because the defendant was not in custody. *State v. Keller*, 114 Ariz. 572, 562 P.2d 1070 (1977). See generally *State v. Sands*, 145 Ariz. 269, 700 P.2d 1369 (App. Div. 2 1985) (unnecessary give defendant *Miranda* over phone where defendant was holed up, shooting at police).

d. In Public

An off-duty officer approached the defendant, whom he knew to be a convicted felon, at a swap meet and asked the defendant if the gun sitting on the table worked and if it was for sale. Defendant answered in the affirmative. No custody. *State v. Wilson*, 25 Ariz.App. 282, 542 P.2d 1162 (App. Div. 2 1975).

Defendant brought her beaten child to the hospital and a guard stayed with her because hospital security feared the husband, who had beaten the child. A police officer took advantage of her emotional state when the child died, and took a statement. The next day, after a discussion with a prosecutor, the officer realized the defendant had incriminated herself. No *Miranda* was necessary since the defendant was not in custody and did not think she was in custody. *State v. Riffle*, 131 Ariz. 65, 638 P.2d 732 (1981).

Ordinarily traffic stops do not constitute "custodial interrogation". *Berkemer v. McCarty*, 468 U.S. 420,

104 S.Ct. 3138 (1984). See *State v. Pettit*, 194 Ariz. 192, 979 P.2d 5 (App. Div. 1 1998).

e. Presentence Reports

Miranda is unnecessary before talking to the defendant as part of routine preparation of a presentence report. *State v. Cawley*, 133 Ariz. 27, 648 P.2d 142 (App. Div. 2 1982).

f. In Prison

Although it is clear that the police may not instruct a cellmate in any course of action which is directed at eliciting information from the defendant *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477 (1985), the court is not to be deprived of information because defendant chooses to talk to a person in the cell and the information is later relayed, "either through prior arrangement or voluntarily," to the authorities. "[T]he defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlman v. Wilson,* 477 U.S. 436, 458, 106 S.Ct. 2616, 2630 (1986).

While defendant's statements to a prison psychologist were not protected by the statutory physician/patient privilege they were still inadmissible due to failure to give *Miranda* warnings. The psychologist was a prison employee and in effect, a law enforcement officer conducting a custodial interrogation. *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315 (1981).

g. Probation

Defendant does not lose his right to avoid self-incrimination just because he is on probation. He still cannot be compelled or coerced. But, he can still voluntarily give statements about guilt. The probationer could have avoiding divulging the incriminating evidence by invoking the Fifth Amendment protections. Thus, answers given by a probationer to his probation officer, which were required under the rules of probation, could be used against him in a criminal proceeding because they were voluntary. *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136 (1984).

h. Admissions at Civil Depositions

The court properly admitted defendant's statements made under oath at a civil deposition. "Generally, the defendant in a civil proceeding has waived his privilege against self-incrimination by making a deposition containing incriminating matters, and it is ordinarily immaterial whether he appeared voluntarily or under compulsion of an order from the court or subpoena or by notice from the adverse party." *State v. Tudgay*, 128 Ariz. 1, 4, 623 P.2d 360, 363 (1981).

i. Admissions to Therapists

Admissions made to a defendant's therapist are admissible without *Miranda* (unless the visits are pursuant to a Rule 11 exam or unless the therapist fits under the A.R.S. § 32-2085 exception for psychologists who have doctorate degrees). *State v. Howland*, 134 Ariz. 541, 658 P.2d 194 (App. Div. 2 1982) (the physician-patient privilege does not apply to psychologist's testimony); *State v. Santeyan*, 136 Ariz. 108, 664 P.2d 652 (1983).

2. On-the-Scene and Detention Questioning

The Supreme Court in the *Miranda* decision itself pointed out that while suspects must be advised of their constitutional rights prior to undergoing custodial interrogation, such interrogations must be distinguished from general, on-the-scene investigations:

> Our decision is not intended to hamper the traditional function of police officers in investigating

> crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

Miranda, *supra*, 384 U.S. at 477-78, 86 S.Ct. at 1629-30, 16 L.Ed.2d at 725-26 (citations and footnote omitted). *State v. Starr*, 119 Ariz. 472, 474, 581 P.2d 706, 708 (App. Div. 1 1978).

Circumstances under which such questioning occurs are most easily characterized as "on-the-scene" and "detention" questioning. Although persons subjected to questioning in these situations may not be free to leave, it is not necessarily custodial interrogation because an innocent citizen would seldom feel that he was in custody or was being interrogated as contemplated by *Miranda*. See *United States v. Ward*, 488 F.2d 162 (9th Cir. 1973), which details when a stop on the scene becomes "custody" and *Arnold v. United States*, 382 F.2d 4 (9th Cir. 1967).

a. On-the-Scene Questioning

Defendant was not in custody and *Miranda* warnings were not required when police were attempting to talk defendant out of committing suicide after he torched his house. The police asked "what happened down there?" and defendant replied, "[I]f I want to burn my f-----g house, I will." "It is clear that it is permissible for a police officer to ask a homeowner what the cause of a fire in his house was without first giving *Miranda* warnings. Such inquiries, even if suspicion exists, are not custodial." *State v. Long*, 148 Ariz. 295, 296, 714 P.2d 465, 466 (App. Div. 2 1986).

The defendant and his brother were at defendant's home and began arguing. The defendant shot and killed his brother, then called police. An officer, upon arrival, asked what happened and the defendant said, "I just shot my brother." The officer then asked where the body and the gun were and the defendant told him. The court held that at the time of the first question, the defendant was neither in custody nor was he being interrogated. The question about the weapon was to prevent "further bloodshed" and for the "safety of the officer." *State v. Melot*, 108 Ariz. 527, 530, 502 P.2d 1346, 1349 (1972).

The defendant raped the victim, then fell asleep. When the police arrived they woke the defendant, asked him his name (Darold), whether he knew the victim (yes), and "What is her name?" (no response). These questions ". . . were not accusatory in nature and were merely in furtherance of a preliminary investigation". *State v. Reinhold*, 123 Ariz. 50, 53, 597 P.2d 532, 535 (1979).

Where an officer saw defendant run from a bar to his car at 2:45 a.m., deposit something under the car and then surreptitiously enter the car, his questions about whom the defendant was and what he was doing were general on-the-scene questioning for which *Miranda* was unnecessary. The officer then noticed a reddish object on the ground underneath the driver's side of appellant's automobile, and upon examination determined that it was a bundle of lock picking tools. Defendant was placed under arrest, and a search incident to arrest was conducted. The search of the defendant's person revealed a marijuana cigarette. Appellant was placed in the patrol car. The officer proceeded to examine the door to the bar, and determined that there had been recent tampering with the lock. He then went back to the patrol car, informed the defendant that he was under arrest for burglary, and advised him of his Miranda rights. Defendant responded that he wished to see an attorney. The court found that the questioning did not become custodial until burglary tools were discovered under the car, even though the defendant was frisked prior to the questioning. *State v. Starr*, 119 Ariz. 472, 474, 581 P.2d 706, 708 (App. Div. 1 1978).

The defendant, an apartment lessee, called the victim, the apartment manager, asking him to come and collect the rent. Later, the victim's wife went to the defendant's apartment, opened the door and saw her husband and the defendant on the floor. When officers arrived, they asked the defendant for identification without giving warnings; the officers then asked what happened, to which the defendant responded that

she had just shot the victim and then herself. Because the officer was concerned for his safety and because he could not see the defendant's hands (which were underneath her) he asked where the gun was. She told him it was under the couch. These questions were "on-the-scene questioning" in "an emergency situation;" therefore, *Miranda* warnings were not required. *State v. Heath*, 122 Ariz. 36, 39, 592 P.2d 1302, 1305 (App. Div. 2 1979).

Miranda warnings were not required prior to investigatory questioning, in response to a citizen's complaint that the suspect had his motorcycle stolen. "It is not the focus of the interrogation, but the custody of the suspect which triggers the requirement of *Miranda* warnings." Here, the defendant was questioned in a shopping center parking lot at about 12:00 noon making this a case of on-the-scene questioning, not custodial interrogation. *State v. Morse*, 127 Ariz. 25, 28, 617 P.2d 1141, 1144 (1980).

The officer's testimony about appellant's statements at the scene of a homicide in response to his questions of who shot the victim, where the gun was and why he shot him were all admissible. Though the officer had probable cause to arrest appellant as soon as he admitted the shooting, the critical issue is not whether probable cause existed but whether the questioning was a custodial interrogation. Considering the totality of the circumstances the facts in the opinion constituted general on-the-scene questioning and the answers were admissible. *State v. Dickey*, 125 Ariz. 163, 608 P.2d 307 (1980).

b. Detention Questioning

Detention questioning occurs when a suspect is stopped on reasonable suspicion and asked a few questions. No warnings are required as long as the questioning is brief and the defendant is not "dragged" around involuntarily (like down to the station). See *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248 (1979); *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319 (1983). However, when defendant is taken from a public place to the police station, the "detention questioning" becomes an arrest and warnings are required. *State v. Winegar,* 147 Ariz. 440, 711 P.2d 579 (1985).

Defendant robbed a taxi driver but was stopped soon after by an officer who saw him leave his apartment. The officer asked the defendant for his cooperation and told him he wasn't under arrest. After questioning, the defendant consented to a search of his apartment where fruits of the crime were found. The court, in finding warnings unnecessary, stated:

> Neither *Miranda* nor *Orozco* require that a police officer refrain from speaking to any citizen on the streets without the requisite warning. Neither opinion suggests that a police officer is precluded from asking questions of or eliciting help from bystanders in the general vicinity of a crime. To require that the police arrest everyone to whom they talk in the course of routine police duties would only serve to place an unwarranted burden on both the police and the citizens of the community.

State v. Sherron, 105 Ariz. 277, 279, 468 P.2d 533, 535 (1970).

Defendant's license number matched that given by a rape victim who reported that the defendant gained entry to her home by stating he worked for ITT. Officers saw the car at an intersection and blocked it from movement. The officers asked defendant's name. Defendant gave his name and "volunteered" that he worked for ITT The court rejected the argument that the officer was required to Mirandize the defendant at that point, holding that "[t]he moment that the on-the-scene general investigation becomes custodial interrogation is not at the moment law enforcement officers have the minimum evidence to establish probable cause." Thus, asking the defendant his name was held outside *Miranda* as a neutral, nonaccusatory investigatory question. Also, the additional comment that defendant worked at ITT was volunteered. Finally, the Court said that even if all its prior reasoning was incorrect, any error in not giving *Miranda* rights before asking defendant's name was harmless. *State v. Landrum,* 112 Ariz. 555, 558, 544 P.2d 664, 667 (1976).

An officer saw the defendant turn on his car lights and hurriedly leave a cul-de-sac next to fenced lumber

yard at 11:40 p.m. The defendant then went through several stop signs. The officer pulled the defendant over and while checking the driver's license saw a large roll of fencing wire in the back seat. When asked about it, the defendant said he bought it two days ago from a friend. A fellow officer checked the lumber yard and found the same wire and evidence of burglary. Although the officer admittedly stopped defendant to ask him about being parked near a commercial yard at so late an hour, the court found that:

> Without question, appellant was temporarily deprived of freedom of action when he was stopped. Under the circumstances, the officer had a founded suspicion that criminal activity might be afoot and the stop was by no means unreasonable. However, the fact that an officer is suspicious of an individual is not the test of whether *Miranda* warnings must be given prior to questioning. Limited questioning during a reasonable investigatory detention is permissible where the confrontation has not reached the "interrogation stage". The officer's questioning was non-accusatory in nature and was merely in furtherance of a proper preliminary investigation. The trial court was correct in permitting these statements into evidence.

State v. Wynn, 114 Ariz. 561, 564, 562 P.2d 734, 737 (1977) (internal citations omitted).

The defendant was stopped for a traffic violation. After the stop, the officer, who was aware of recent thefts of TV's, saw three TV's in plain view in the bed of the defendant's truck. The officer questioned the defendant about the TV's. The defendant said they were his but he had no proof of ownership. The officer then asked if the defendant would accompany him to the station to see if the TV's were stolen. The defendant consented. *Miranda* warnings were unnecessary because "at the very most, this was preliminary inquiry into an unsolved theft." *State v. Perez*, 7 Ariz.App. 567, 570, 442 P.2d 125, 128 (1968).

The defendant robbed the victim, but the victim followed the defendant to a bar. An officer was then summoned who asked the defendant, "Is that your bag?" The defendant said, "Yes, I bought it from a man." The bag contained the victim's property including his welfare check. No warnings were required:

> The fact that an officer may be suspicious of an individual is not the test as to whether *Miranda* warnings must be given prior to questioning, nor is the mere presence of a police officer to be considered a restraint on the suspect's liberty. The vital point is whether, examining all the circumstances, the defendant was deprived of his freedom of action in any significant manner, and the defendant was aware of such restraint.

State v. Bainch, 109 Ariz. 77, 79, 505 P.2d 248, 250 (1973).

3. Volunteered Statements

"Volunteered statements (statements not in response to questioning) of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602 (1966). See *Edwards v. Arizona*, *supra*; *State v. Burns*, 142 Ariz. 531, 691 P.2d 297 (1984).

Volunteered statements includes a defendant walking up to a police officer and saying he killed someone, *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515 (1986) (officer acted properly, court erred when it suppressed because voices in defendant's head made him confess). Volunteered statements also include statements made to a third party in the presence of an officer with a tape recorder. *Arizona v. Mauro*, 481 U.S. 520, 107 S.Ct. 1931 (1987).

Police officers initially attempted to ignore defendant's repeated invocation of *Miranda*. They stopped questioning him and spent an hour helping him try to get a lawyer. Defendant had an extensive criminal background and had recited his rights to police. At the end of the hour, as officers prepared to transport defendant, defendant said he was acting as his own lawyer, and would talk against his own advice. His

statements were properly admitted. *State v. Ferreira*, 152 Ariz. 289, 731 P.2d 1233 (App. Div. 2 1986)

Statements volunteered to cellmates or jail house informants are admissible unless the defendant can "demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks" even though police planted the informant with instructions to just listen. *Kuhlmann v. Wilson*, 477 U.S. 436, 459, 106 S.Ct. 2616, 2630 (1986).

The defendant stabbed the victim at the defendant's apartment. Defendant was apprehended shortly thereafter and while in transit to the station said, "Four guys came into my house, I pushed them outside, and I stabbed two of them with my knife." Although warnings had not been given, the statement was not made in response to any question by the officer and was therefore volunteered. *State v. Adrian*, 24 Ariz.App. 344, 345, 538 P.2d 773, 774 (App. Div. 1 1975).

The defendant and the victim had been drinking together for a couple of hours in a bar, became intoxicated and left together. The defendant later shot the victim eleven times. Afterwards, he went to the police station to talk to the chief of police. When told the chief was not there and asked if anyone else could be of help, the defendant responded that he had murdered a man. Volunteered. *State v. Arredondo*, 111 Ariz. 141, 526 P.2d 163 (1974).

A transportation officer, taking the defendant to the county hospital, told the defendant that he could not discuss the case with the defendant as the public defender had told him not to. The defendant then began asking the officer questions. The officer again told the defendant he didn't want to discuss the case. The defendant at the hospital, began to make many admissions. All statements were admissible as officer "scrupulously honored" defendant's right to remain silent. No need to give *Miranda* as the officer asked no questions. *State v. Fears*, 116 Ariz. 494, 498, 570 P.2d 181, 185 (1977).

The defendant asked the transporting officer after apprehension, "What kind of deal they gave informants." No issue of voluntariness and statement was volunteered and "spontaneous." *State v. Hickey*, 114 Ariz. 394, 396, 561 P.2d 315, 317 (1977).

The defendant was found five blocks from the scene of the arson. He was intoxicated and slumped over the steering wheel of his truck. Warnings were given and defendant made several admissions. Later, on the way to jail, in response to the statement of charges, the defendant said, "All I did was set a trash can on fire." Although the defendant was too intoxicated to understand his rights, "[t]he statement which he volunteered appear(ed) to be appropriate in context . . . and accurate in its description as to how the fire started," and therefore admissible. *State v. Miller*, 123 Ariz. 491, 494, 600 P.2d 1123, 1126 (App. Div. 2 1979) (reversed on other grounds).

Defendant was told to try on some boots and dentures found at the scene of the crime. He thanked the police for the dentures, said he needed them, but needed glue to make the dentures stay in. His spontaneous and volunteered statements were properly admitted. *State v. Bridges*, 123 Ariz. 452, 600 P.2d 756 (App. Div. 1 1979).

One racing commission officer handed another officer the shocking device that the defendant/jockey had dropped upon being approached. His conduct was not the "functional equivalent of interrogation" and defendant's volunteered remark "it's a cheap one" was admissible. "It cannot be said that [the officer] should have known when he handed the electrical device to [the other officer] in defendant's [presence] the action was reasonably likely to elicit an incriminating response from [defendant]." *State v. Rainey,* 137 Ariz. 523, 527, 672 P.2d 188, 192 (App. Div. 2 1983).

During frisking, cartridges were found and the officer asked defendant where the gun was. The gun turned out to be stolen. The question was not "reasonably likely to elicit an incriminating response" so no *Miranda* need be given; the gun could have been legally in a holster in the glove. *State v. Waggoner*, 139 Ariz. 443, 446, 679 P.2d 89, 92 (App. Div. 2 1984).

A defendant who asked why the police waived two weeks to pick him up after he invoked his rights made voluntary statements. *State v. Moya*, 138 Ariz. 7, 672 P.2d 959 (App. Div. 1 1983).

4. Questioning to Save or Protect a Life

The Supreme Court in Miranda did not mention "emergency" circumstances where a suspect in custody being interrogated, may have information which may save or protect a life. The court has upheld "life-saving" questions without Miranda. An armed robber was chased down in a grocery store and his shoulder holster was empty when he was captured. Police did not have to give Miranda before asking where the gun was, because the only question they asked before Miranda was given was intended to eliminate the emergency. *New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626 (1984).

Arizona and California courts have determined that such situations fall outside the scope of *Miranda*. *State v. Heath*, 122 Ariz. 36, 592 P.2d 1302 (App. Div. 2 1979) (locating the gun used); *State v. Melot*, 108 Ariz. 527, 502 P.2d 1346 (1972) (same); *People v. Dean*, 39 Cal.App.3d 875, 114 Cal.Rptr. 555 (1974) (locating kidnap victim).

5. Non-Testimonial Statements

Miranda does not apply to non-testimonial statements because the Fifth Amendment privilege reaches only compulsion of "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications." *Schmerber v. California*, 384 U.S. 757, 763-64, 86 S.Ct. 1826, 1832 (1966).

a. Voice Identification

A non-testifying defendant was required at trial to speak the words which the victim testified were spoken to him at the time of the robbery. The court found this compelled speaking was not testimonial and hence was not violative of the privilege against self-incrimination. *State v. Spain*, 27 Ariz.App. 752, 558 P.2d 947 (App. Div. 2 1976); *United States v. Wade*, 388 U.S. 418 (1967) (defendant in line-up required to speak words used by robber); *State v. Jackson*, 112 Ariz. 149, 539 P.2d 906 (1975) (same); *State v. Bridges, supra* (pictures of defendant wearing clothes and dentures properly admitted at trial).

b. Handwriting Exemplars

The defendant was required to give handwriting exemplars in order to compare his handwriting to a note given a bank teller during an armed robbery. No warnings were given before the exemplars were ordered. The court found no Fifth (or Sixth) Amendment violation. "A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection." *Gilbert v. California*, 388 U.S. 263, 266-67, 87 S.Ct. 1951, 1953 (1967).

c, Comment on Refusal to Give Physical Samples

"The refusal to give a blood sample is non-testimonial evidence and therefore comment on the refusal does not violate the Fifth Amendment." The State could introduce evidence of defendant's refusal to give urine samples. *State v. Curiel*, 130 Ariz. 176, 181, 634 P.2d 988, 993 (App. Div. 1 1981); *See South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916 (1983).

Careful, if Rule 15.2 could be invoked, comment on the refusal without having resorted to Rules 15.2 and 15.7 is reversible error. Here, any drugs would have evaporated from the blood long before Rule 15.2 could be brought into play, so the comment was proper. *State v. Curiel*, 130 Ariz. 176, 634 P.2d 988 (App. Div. 1 1981).

d. DWI Alphabet and Numbers Tests

Recitation of the alphabet or numbers during field sobriety tests does not require *Miranda* warnings. The significance of the test is the manner in which the test is performed, not the content. *State v. Superior Court*, 154 Ariz. 275, 742 P.2d 286 (App. Div. 2 1987).

6. Misdemeanors

Miranda applies to misdemeanors. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984); *State v. Tellez*, 6 Ariz.App. 251, 431 P.2d 691 (1967). The United States Supreme Court's definition of when an arrest occurs in a traffic case is more favorable than an old Arizona case. *Campbell v. Superior Court*, 106 Ariz. 542, 479 P.2d 685 (1971).

7. Statements Taken by Probation Officers

Statements taken by probation officers in violation of *Miranda* are admissible at subsequent probation hearings, *State v. Rivera*, 116 Ariz. 449, 569 P.2d 1347 (1977); *State v. Smith*, 112 Ariz. 416, 542 P.2d 1115 (1975), but are inadmissible at trial. *State v. Gillies*, 135 Ariz. 500, 662 P.2d 1007 (1983); *State v. Maqby*, 113 Ariz. 345, 554 P.2d 1272 (1976) (harmless error here).

8. Statements Taken by Private Citizens

Responses to questions posed by private citizens or persons not connected with law enforcement are outside the scope of *Miranda*, and therefore, warnings are unnecessary. *State v. Lombardo*, 104 Ariz. 598, 457 P.2d 275 (1969) (statements made to private security officers); *State v. Schmidqall*, 21 Ariz.App. 68, 515 P.2d 609 (App. Div. 1 1973) (conversation between two persons under arrest); *State v. Lerma*, 17 Ariz.App. 110, 495 P.2d 880 (App. Div. 1 1972) (must be questioning by "public officer"); *State v. Christopher*, 10 Ariz.App. 169, 457 P.2d 356 (1969) ("private citizens" outside *Miranda*); *State v. Hess*, 9 Ariz.App. 29, 449 P.2d 46 (1969) (store employees investigating store fires).

Be careful with informants. If an informant is used to elicit information from a jailed inmate, the information will be suppressed, as a violation of defendant's counsel. *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477 (1985). See *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183 (1980). However, if the informant is acting on his own, or contrary to official instructions, the information has been admitted. *State v. Schad*, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied 102 S.Ct. 1492.

A United States Supreme Court ruling places the burden on the defendant to prove "the police and their informant took some deliberate action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlman v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616 (1986).

Police officer overheard defendant telling emergency room personnel the drugs that defendant had consumed prior to the fatal wreck. The physician-patient privilege, A.R.S. § 13-4062(4) did not prevent introduction of these statements, because the statute did not apply to the words the officer overheard. *State v. Huffman*, 137 Ariz. 300, 670 P.2d 405 (App. Div. 2 1983).

B. Did the Defendant Assert (Or, Conversely, Waive) His Rights?

In *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350 (1994), the United States Supreme Court resolved the question of what approach to take when determining whether a waiver is valid. The court determined that it is an objective inquiry under which the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* at 459, 114 S.Ct. at 2355. If the statement meets this level of clarity, all questioning must cease. However, if anything about the request or the surrounding circumstances would render the suspect's response ambiguous, police may continue questioning the suspect.

A criminal defendant waives his rights expressly (by stating that he waives them) or by conduct (in which after full knowledge of his rights, he answers questions). *State v. Jones*, 203 Ariz. 1, 5, 49 P.3d 273, 277 (2002); *State v. Jenkins,* 111 Ariz. 13, 522 P.2d 1090 (1974).

In determining whether a defendant waived his or her rights, a trial court must "focus on the particular facts and circumstances of a case, including the defendant's background, experience and conduct." *State v. Rivera*, 152 Ariz. 507, 513, 733 P.2d 1090, 1096 (1987).

"There is no requirement that police give the accused a written or oral examination in order to determine whether he understands his rights. Appellant said he understood them and the police have a right to rely on his statement." *State v. Howland,* 134 Ariz. 541, 545, 658 P.2d 194, 199 (App. Div. 2 1982).

1. Verbal Waiver

Defendant told police, "I've got no problem talking to you." *State v. Smith*, 193 Ariz. 452, 459, 974 P.2d 431, 438 (1999).

"Defendant was read his rights and asked, 'Having in mind an understanding of your rights, do you want to speak with us.' Defendant responded, 'Yes I *am."*' This constituted a valid waiver of his Miranda rights. *State v. Dickens*, 187 Ariz. 1, 9, 926 P.2d 468, 476 (1996).

"[Y]eah, I guess I'll answer the questions." *State v. Stabler*, 162 Ariz. 370, 375, 783 P.2d 816, 821 (App. Div. 2 1989).

Defendant walked up to a police officer and said he had killed someone. The officer gave him *Miranda* warnings and defendant confessed again. The trial court erred when it suppressed the statements because the voices in the defendant's head make him confess. *Colorad v. Connelly*, 479 U.S. 157, 107 S.Ct. 515 (1986).

Defendant said a lawyer would tell him not to talk, acting as his own lawyer he told himself not to talk, but he was ignoring his own advice. *State v. Ferreira*, 152 Ariz. 289, 292, 731 P.2d 1233, 1236 (App. Div. 2 1986).

The defendant, after being warned, told the officers that he wanted a court-appointed lawyer but the record showed that the defendant meant he wanted a lawyer for his trial and that the defendant stated, "I don't need a lawyer to talk." *State v. Arredondo,* 111 Ariz. 141, 145, 526 P.2d 163, 167 (1974).

In response to police questioning whether he understood his rights, the defendant stated, "I'm doing it completely on my own will. Nobody has talked me into doing this. I am just volunteering it." This statement constituted a voluntary waiver. *State v. Ring,* 131 Ariz. 374, 377, 641 P.2d 862, 865 (1982).

Pharmacist who voluntarily answered questions after being read his rights during an administrative search waived his right to remain silent. *Mendez v. Arizona State Board of Pharmacy,* 129 Ariz. 89, 92, 628 P.2d 972, 975 (App. Div. 2 1981). Defendant said on tape that he hadn't requested his attorney because the attorney would have told him not to talk. *State v. Hanson,* 138 Ariz. 296, 300, 674 P.2d 850, 854 (App. Div. 2 1983).

2. Waiver By Conduct

In *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755 (1979), the United States Supreme Court declined to require law enforcement obtain an express statement of waiver of *Miranda* rights. Instead, it must be determined whether a valid waiver exists by the particular facts and circumstances of the case. The defendant robbed a gas station and seriously wounded the attendant. FBI agents showed the defendant a written "Advice of Rights" form which the defendant read and acknowledged that he understood. The defendant then said, "I will talk to you but I am not signing any form." At no time did the defendant expressly waive his right to counsel or assert his right thereto.

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

441 U.S. at 373, 99 S.Ct. at 1757.

The trial judge abused his discretion in suppressing the defendant's statements where the defendant answered questions after receiving his warnings, but never "specifically state[d] he waived counsel." *State ex rel Berger v. Superior Court,* 109 Ariz. 506, 513 P.2d 935 (1973).

The defendant's question ("When can I get a lawyer?") was, at the very least, "an ambiguous request for counsel that, without more, should have stopped all questioning except that which would have been necessary to clarify whether she wanted a lawyer before questioning." However, defendant then continued the conversation by asking the officers about the charges against her. This conduct was a waiver of her right to counsel and subsequent statements were admissible. *State v. Inman,* 151 Ariz. 413, 416-17, 728 P.2d 283, 286-87 (App. Div. 1 1986).

3. Conduct or Words Which Do Not Invoke Rights

Defendant's remark, "Maybe I should talk to a lawyer," was not a request for counsel. *Davis v. United States,* 512 U.S. 452, 462, 114 S.Ct. 2350, 2357 (1994).

Defendant's statement that he would talk but would not put anything in writing until his attorney got there was not an invocation of his right to remain silent. The court found his invocation was limited to making written statements without an attorney. *Connecticut v. Barrett,* 479 U.S. 523, 107 S.Ct. 34 (1987).

Defendant told officers he thought he might need an attorney and asked the detectives whether they thought he needed one. This was, at best, an "ambiguous suggestion" he might want an attorney. *State v. Zinsmeyer*, 222 Ariz. 612, 619, 218 P.3d 1069, 1076 (App. Div. 2 2009), citing *Davis v. United States,* 512 U.S. 452, 459, 114 S.Ct. 2350 (1994); *State v. Ellison,* 213 Ariz. 116, ¶ 29, 140 P.3d 899, 910 (2006); *State v. Eastlack,* 180 Ariz. 243, 250-51, 883 P.2d 999, 1006-07 (1994).

Answering questions after police officer gives *Miranda* rights constitutes valid waiver. *State v. Moreno-Medrano*, 218 Ariz. 349, 351, 185 P.3d 135, 127 (App. Div. 2 2008); *State v. Trostle*, 191 Ariz. 4, 951 P.2d 869 (1997). *But see State v. Davolt*, 207 Ariz. 191, 202, 84 P.3d 456, 467 (2004) (waiver of rights will not be presumed if the defendant answers questions posed after he invoked his *Miranda* rights).

Defendant was not being interrogated when he said that he would leave it up to the officers whether he needed an attorney. This equivocal remark was insufficient to invoke his right to counsel. *State v. Moorman,* 154 Ariz. 578, 585, 744 P.2d 679, 686 (1987).

A defendant with a low IQ did not invoke *Miranda* when he asked to see his counselor. *State v. Guillen,* 151 Ariz. 115, 117, 726 P.2d 212, 214 (App. Div. 2 1986). Citing *Fare v. Michael C.,* 442 U.S. 707, 99 S.Ct. 2560 (1979), the court noted that a suspect's request for a probation officer, clergyman, or close friend will not invoke *Miranda* either.

Neither the defendant's sister nor the attorney she hired could assert the defendant's right to counsel. Thus,

the defendant's waiver, made without knowledge of his sister's and attorney's efforts on his behalf was valid. *Moran v. Burbine*, 475 U.S. 412, 422, 106 S.Ct. 1135, 1141 (1986).

Defendant did not invoke his right to counsel when he asked officers who a good attorney was. Defendant was a former police officer and he said on tape he left the matter of whether he wanted an attorney up in the air. *State v. Linden,* 136 Ariz. 129, 134, 664 P.2d 673, 678 (App. Div. 1 1983).

Defendant did not invoke his rights by refusing to sign the rights card. *State v. Montes,* 136 Ariz. 491, 495-96, 667 P.2d 191, 195-96 (1983).

The defendant and his partner robbed a liquor store and were caught after a chase. The fact that when the defendant was asked his name and his partner's name he responded by saying the police would have to ask his attorney for that information, did not constitute an invocation of *Miranda* rights. *State v. Gholson,* 112 Ariz. 545, 548, 544 P.2d 654, 657 (1976).

Defendant murdered his estranged wife's lover in his wife's presence. Wife called police and upon their arrival, an officer gave the defendant his warnings, which defendant recited along with the officer. Defendant then said he understood his rights. Another officer then ascertained from the defendant that he had received his rights. Defendant then gave his attorney's card to the officer, but indicated he would answer questions as best he could. Defendant never asked for his attorney. The giving of the card alone is not a request for an attorney. *State v. Brosie,* 24 Ariz.App. 517, 520, 540 P.2d 136, 139 (App. Div. 2 1975).

The defendant, after being warned and waiving his rights, answered some questions, but refused to answer others. This was not an assertion of his right to remain silent on subsequent questions, and was an indication that he understood his rights. *State v. Greenawalt*, 128 Ariz. 150, 160, 624 P.2d 828, 838 (1981) remanded for voluntariness hearing, *Greenawalt v. Ricketts,* 784 F.2d 1453 (9th Cir. 1986).

After warnings and waiver, an officer asked the defendant many questions, one of which was when he had been in Arizona. Finn responded, "I wouldn't be crazy enough to tell you that." Under the abuse of discretion test, the Court ruled the statement was not an assertion of rights and was an admission. *State v. Finn,* 111 Ariz. 271, 276, 528 P.2d 615, 620 (1974).

Defendant did not assert his right to remain silent when he told officers to turn off the tape recorder because he didn't want the statement recorded. Defendant had been warned, understood his rights, and he continued to speak after detectives told him the tape recorder had to stay on for his protection and theirs. *State v. Graham,* 135 Ariz. 209, 210-11, 660 P.2d 460, 461-62 (1983).

4. An Officer Should Clear Up an Equivocal Assertion or Waiver

Although not constitutionally required, the United States Supreme court has suggested that "when a suspect makes an ambiguous or equivocal statement it will often be good police practice ... to clarify whether or not he actually wants an attorney." *State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999 (1994), citing *Davis, supra,* 512 U.S. at 461, 114 S.Ct. at 2356. If there is an equivocal waiver, the only questioning allowed are questions to determine whether defendant wanted to invoke her rights. *State v. Finehout,* 136 Ariz. 226, 665 P.2d 570 (1983).

After the defendant asked for a lawyer, the officer ceased questioning but the defendant asked questions about the case. The officer refused to answer, reminding the defendant that he could only talk to him if the defendant specifically requested to speak to him. *State v. Jones*, 203 Ariz. 1, 5, 49 P.3d 273, 277 (2002).

The defendant, under surveillance since driving from Mexican border, was properly stopped near Tucson. The officer gave *Miranda* warnings and the suspect said he would talk, but refused to answer questions. The suspect was transported to Tucson for further questioning.

Off.: Do you understand your rights?

Sus.: Yes, but I don't have money for an attorney.

Off.: In that case, the court will provide you with one. Do you want to talk about what you have in the car?

Sus.: Okay. Okay, but with an attorney.

Off.: Do you want to talk to me now without an attorney?

Sus.: That's fine.

This is a very close case with majority saying the officer was just trying to clear up in his own mind whether the suspect really wanted a lawyer. The dissenting judges said although *Miranda* doesn't automatically prohibit further questioning, this suspect was pressured into a statement. *United States v. Rodriquez*, 569 F.2d 482 (9th Cir. 1978).

The defendant was stopped for speeding. Officer smelled marijuana and searched the trunk finding 14 bricks of marijuana. The officer then gave *Miranda* warnings. The defendant responded, "I don't want to talk to anybody" or "I don't want to see anybody." Because the officer was unsure whether the defendant meant he didn't want to talk to officers or attorneys, he said, "We have undercover agents that you can talk to if you want." Four or five miles later, the defendant asked what an undercover officer could do for him. Subsequently, a confession was obtained. The defendant's statement was neither an assertion of his rights nor was the officer's statement "interrogation." *State v. Torres,* 121 Ariz. 110, 114, 588 P.2d 852, 856 (App. Div. 2 1978).

Defendant said, among other things, "I ain't saying shit." Officer replied, "Do you want me to ask you some more questions or you want me not to ask you any more questions?" The opinion said, "The detective merely attempted to ascertain whether appellant intended to invoke his right to remain silent. In so doing, the interrogator made it clear that it was entirely appellant's choice whether he wished to continue and that he had no obligation to speak." The court properly admitted defendant's statements. *State v. Hicks,* 133 Ariz. 64, 74, 649 P.2d 267, 277 (1982).

After defendant gave three voluntary statements, admitting a murder, he then spoke with his attorney and was advised to remain silent. Later he indicated he would give a statement telling where the murder weapon was but he requested to speak to his mother. This request was not equivalent to a request for an attorney and therefore all of his statements were admissible. *State v. Valencia,* 121 Ariz. 191, 195-96, 589 P.2d 434, 438-39 (1979).

Defendant asked "When can I get a lawyer?" and this question should have stopped all questioning, except that necessary to clear up the equivocal assertion. However, the defendant then immediately re-initiated a conversation about the charges against her, effectively waiving her right to counsel. The Arizona Supreme Court's ruling in *Finehout* does not require officers to "refuse to engage in a dialogue initiated by the appellant so that the policeman could clarify an ambiguous request when the appellant had just been clearly told that she did not have to answer questions without counsel present." *State v. Inman,* 151 Ariz. 413, 728 P.2d 283 (App. Div. 1 1986).

5. Was the Defendant Competent to Waive His Rights?

Defendant could make a knowing and intelligent waiver of his rights without the information that his sister had contacted an attorney and that the attorney had already contacted the police on his behalf. Thus, the defendant's statements made after three warnings and execution of three written waivers were voluntary and admissible. *Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135 (1986).

For a statement to be admissible, a defendant must knowingly and intelligently waive his constitutional rights. A defendant's intelligence level and degree of intoxication are among the factors to be considered. *State v. Ramirez,* 116 Ariz. 259, 266, 569 P.2d 201, 208 (1977). However, "low intelligence, in itself, will not invalidate

an otherwise knowing and intelligent waiver." *State v. Tothill,* 120 Ariz. 406, 408, 586 P.2d 655, 657 (App. Div. 1 1978), citing *Ramirez, supra*, and *State v. Drury*, 110 Ariz. 447, 520 P.2d 495 (1974).

Although the defendant was under the influence of alcohol at the time, when police advised him of his *Miranda* rights 45 minutes after the arrest, the defendant "responded that he had heard them plenty of times before and knew them better than the officer did." This was a valid waiver. *State v. Henry*, 176 Ariz. 569, 577, 863 P.2d 861, 869 (1993).

The defendant was too intoxicated to understand the waiver of his rights. *State v. Miller,* 123 Ariz. 491, 494, 600 P.2d 1123, 1126 (App. Div. 2 1979). (See the subsection on Intoxication, supra -- this is a rare case.)

The defendant must be so intoxicated that he is unable to understand the meaning of his statements before they will be deemed inadmissible. *State v. Rivera,* 152 Ariz. 507, 513, 733 P.2d 1090, 1096 (1987); *State v. Laffoon,* 125 Ariz. 484, 610 P.2d 1045 (1980).

If a defendant is incompetent to waive his attorney for purposes of criminal proceedings, he was incompetent to waive his attorney for purposes of giving a statement. *State v. Doss*, 116 Ariz. 156, 160, 568 P.2d 1054, 1058 (1977) (harmless error here, but still a dangerous dictum). (See the subsection on low intelligence, supra.)

6. DWI and Counsel

The topic of what happens when a defendant invokes *Miranda* during a DWI arrest is discussed extensively in the A.P.A.A.C. DWI Manual. In case you lack access to that, *Miranda* applies once the defendant is arrested. If the defendant invokes the right to counsel and police continue questioning, the statements should be suppressed (from use in the case-in-chief). Police need not let the defendant consult with counsel before taking the breath test if consultation would be an "unnecessary interruption of the ongoing investigation." *Hively v. Superior Court,* 154 Ariz. 572, 744 P.2d 674 (1987).

7. Spanish speakers

El Salvadoran defendant unsuccessfully argued that his limited intelligence and cultural background precluded a knowing and intelligent waiver of his Miranda rights. The court rejected the claim, noting that *Miranda* rights were read to him in Spanish at least twice before he confessed. *State v. Amaya-Ruiz*, 166 Ariz. 152, 166, 800 P.2d 1260, 1274 (1990).

Mexican defendant with a third-grade education who spoke no English and had no previous contact with the U.S. justice system found to have intelligently waived Miranda rights read o him in Spanish. *State v. Rivera,* 152 Ariz. 507, 513, 733 P.2d 1090, 1096 (1987). *See also State v. Montes,* 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983).

Court rejected the Cuban defendant's argument that he did not knowingly and intelligently waive his Miranda rights where the rights were spoken to him in Spanish with a Mexican accent. Defendant appeared to understand the warnings, signed a waiver form, and conversed with the officer in Spanish. *United States v. Martinez,* 588 F.2d 1227, 1235 (9th Cir. 1978).

C. Did The Officer Scrupulously Honor Defendant's Right To Cut Off Questioning?

When a defendant has asserted his *Miranda* rights, all questioning must cease immediately. A suspect's right to cut off questioning must be "scrupulously honored." *Michigan v. Mosley,* 423 U.S. 96, 104, 96 S.Ct. 321, 326 (1975); *State v. Bravo,* 158 Ariz. 364, 368, 373, 762 P.2d 1318, 1322, 1327 (1988). Questioning includes conduct an officer knows or should reasonably know would elicit a statement. *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682 (1980) (no questioning where officer said he hoped a handicapped kid wouldn't find the murder weapon and hurt herself with it). If officers continue questioning a defendant who has invoked his rights, the statements are not admissible as part of the case-in-chief. *Hively v. Superior Court,*

154 Ariz. 572, 744 P.2d 673 (1987). Once a defendant has invoked his right to counsel, officers may not question him until counsel has been provided, unless the defendant himself initiates further questioning. If the defendant initiates further conversation, the State must prove that the waiver of his right to counsel/silence was a knowing, intelligent, and voluntary waiver. *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880 (1981). Given a defendant who says he wants to talk after he has invoked his right to counsel, officers should probably re-warn the defendant. (Use *Greenwalt, infra,* if the officer did not re-warn defendant.)

After being read his Miranda rights, the defendant said he had "nothing to say." The officer kept questioning the defendant, first by asking the defendant to "clarify" his response and then asking whether he wanted to tell his side of the story. The court found that the defendant's response was an unambiguous invocation of his right to remain silent and that the officer's further questioning failed to scrupulously honor that right. State v. Szpyrka, 220 Ariz. 59, 62, 202 P.3d 524, 527 (App. Div. 2 2008).

In *State v. Finehout,* 136 Ariz. 226, 229, 665 P.2d 570, 573 (1983), the court found an obvious violation of the principles set out above. In *Finehout,* the defendant said "Well, I ain't going to say any more." In spite of this assertion, the detective continued to question the defendant and reminded him how important it was to tell the truth. Later, the defendant asked for a lawyer. Detectives turned off the tape recorder they were using and ostensibly ended the interrogation. However, the testimony of the officers indicated that they continued to talk to the defendant. The state's claim that further conversations were instigated by the defendant was flatly rejected. The conviction was reversed.

In *State v. Ashelmen,* 137 Ariz. 460, 463-64, 671 P.2d 901, 904-05 (1983), the defendant made a statement in response to detective's mention that the victim was having difficulty with her insurance company because her car could not be located. The detective continued the conversation after defendant invoked his right to counsel. The Arizona Supreme Court ruled the police officer did not "scrupulously honor" the defendant's invocation of rights when he continued the conversation after defendant indicated he did not wish to talk about the case.

1. Equivocal Invocation and Unknown Invocations

One potential stumbling block has been cleared up in Arizona. It is clear that an officer may clear up an equivocal invocation of defendant's rights, *State v. Hicks,* 133 Ariz. 64, 649 P.2d 267 (1982); *State v. Finehout,* 136 Ariz. 226, 665 P.2d 570 (1983). Indeed, if the defendant apparently asks for a lawyer, all the officer can do is clarify whether defendant wants a lawyer. *State v. Inmann,* 151 Ariz. 413, 728 P.2d 283 (App. Div. 1 1986).

The uncertain area is what happens if a defendant invokes his rights with one officer and then another officer unknowingly warns defendant and takes a statement. Intent and knowledge seem to be the focus of the cases so far. The best Arizona case is *State v. Morgan,* 149 Ariz. 112, 716 P.2d 1049 (App. Div. 2 1986). There, an out-of-state traffic stop resulted in the defendant's arrest for driving a stolen vehicle. Defendant invoked his rights at the scene. The officer contacted the detective for auto thefts and told him about the arrest, but not about defendant invoking *Miranda.* Three hours later, the detective arrived, read the defendant his rights and got a statement. The Court of Appeals upheld the admission of the statement.

In *State v. Lawson,* 144 Ariz. 547, 551-52, 698 P.2d 1266, 1270-71 (1985), the court found the defendant's statement, "I've got nothing to say," to be no more than a response to direct questions by the police. Under a totality of the circumstances review, the statement was properly admitted because, in context, the defendant was denying participation in the crime. Don't forget to check cases in the "Conduct or Words Which do not Invoke Rights" subsection, supra.

2. Defendant Arrested on Other Charges

Officers may talk to a defendant in custody on one charge about other, unrelated charges. *State v. Osbond,* 128 Ariz. 76, 623 P.2d 1232 (1981), cert. denied 102 S.Ct. 163 (defendant's murder confession admitted although made when defendant was allegedly illegally detained on criminal impersonation charges). *Maine v. Moulton,* 474

U.S. 159, 106 S.Ct. 477 (1985), held that evidence gathered on unrelated charges could be used on the unrelated charges.

However, remember that a defendant must be given *Miranda* warnings if he is being interrogated on any charge while he is in custody. Thus, once questioning on an unrelated charge becomes "interrogation," defendant should be warned. *See State v. Montes,* 136 Ariz. 491, 494-97, 667 P.2d 191, 194-97 (1983).

If a defendant invokes *Miranda* on one charge, he may not be questioned on unrelated charges until he has been furnished counsel on the charge. *State v. Routhier,* 137 Ariz. 90, 97-98, 669 P.2d 68, 75-76 (1983); *State v. Allen,* 140 Ariz. 412, 682 P.2d 417 (1984) (can't be questioned on related charges); *State v. Hensley,* 137 Ariz. 80, 669 P.2d 58 (1983).

3. Arizona Cases: Interrogation

If the defendant invokes his rights, that invocation must be honored. Interrogation includes words or conduct which is designed to get defendant to answer questions. In one case, defendant invoked his rights, and his wife repeatedly asked to see him. Finally officers agreed,letting both know the conversation would be recorded by an officer standing in the room. As the officers hoped, defendant made statements to his wife that severely damaged his insanity defense. The Arizona Supreme Court suppressed the confession. The United States Supreme Court reversed the Arizona Supreme Court, saying the officers' hope that defendant would confess did not amount to the "functional equivalent of interrogation. *Arizona v. Mauro,* 481 U.S. 520, 107 S.Ct. 1931 (1987).

After questioning, the suspect in an armed robbery case said, “Well, I don't want to answer anymore.” The court found this was a clear invocation of the defendant's right to remain silent and suppressed statements obtained after officers took a break and came back to ask more questions about the crime. *State v. Strayhand*, 184 Ariz. 571, 585, 911 P.2d 577, 591 (App. Div. 1 1995).

After the defendant stated, "That is all I want to say. I am tired," the officer reminded the defendant of his rights, stated his preference to finish the questioning and asked if the defendant would continue. The defendant said, “yes.” The court held that the defendant's statement was ambiguous because it was unclear whether the defendant did not want to answer any more questions or whether he was merely tired and would answer questions after a break. Therefore, it was okay for the officer to ask a follow up question to clarify the defendant's intent. *State v. Zimmerman,* 166 Ariz. 325, 330, 802 P.2d 1024, 1029 (App.1990).

If a defendant invokes his rights, asking him for consent to search is interrogation. Any such consent is invalid. *State v. Britain,* 156 Ariz. 384, 386, 752 P.2d 37, 39 (App. Div. 2 1988).

Defendant invoked his right to counsel and the officers turned off the tape. The officers then had a conversation with themselves where they told each other that the co-defendant had named the defendant as the trigger man and it was too bad the defendant would take the rap for the co-defendant and would receive the death penalty. Much to the surprise of everyone, the defendant changed his mind and confessed. The Arizona Supreme Court reversed, holding the "conversation" was interrogation after defendant invoked his rights. The court also suppressed the statement as involuntary because of the threat of the death penalty. *State v. Emery,* 131 Ariz. 493, 497-98, 642 P.2d 838, 842-43 (1982).

The defendant's footprints lead from burglarized residence to an outer building of a friend's home. Officers warned the defendant, but he refused to speak to anyone but a Black officer and began discussing religion. The Black officer asked a few questions then asked, "How did you get into the building?" The defendant responded, "I am not saying nothing". The officer then asked other questions which the defendant answered, making admissions, but later reiterated his desire not to talk. The officer at the suppression hearing testified that he continued to ask the defendant questions because it was standard procedure. The court suppressed the defendant's statements because it “ignore[d] a plain statement by a suspect” that he didn't want to answer questions. *State v. Clemons,* 27 Ariz.App. 193, 197, 552 P.2d 1208, 1212 (App. Div. 1 1976).

The defendant, a suspect in a burglary case, was given his warnings but refused to talk. The officer then pointed to a box containing stolen items and said they had a good case against the defendant and that they would probably find his prints on the property. The defendant's subsequent statements were suppressed because the officer's statements and confrontation were, in fact, a form of interrogation and a failure to scrupulously honor the defendant's right to cut off questioning. *State v. Sauve,* 112 Ariz. 576, 579, 544 P.2d 1091, 1094 (1976).

The defendant sodomized and murdered a six-year-old boy. After arrest and warnings, the defendant asserted his rights. On the way to the station, the defendant volunteered that he would probably be a scapegoat in the case because of his prior record and the lack of other suspects. At the station as the officers prepared to take a pubic hair for comparison, they saw that the defendant's pubic hair had been shaved. An officer then either said or queried, "Shaved!(?)". The defendant then discussed why he had shaved (crabs). The defendant was then asked how his palm print was lifted from the bedroom window of the victim's home. The defendant responded that he had no explanation. All statements at the station were suppressed. The word "shaved" was interrogative. That question and others which followed were a failure to scrupulously honor the defendant's rights. The volunteered statement, in transit, "did not indicate . . . a desire to answer questions." *State ex rel LaSota v. Corcoran,* 119 Ariz. 573, 579-80, 583 P.2d 229, 235-36 (1978).

Other Arizona cases citing *Edwards* briefly hold defendant's statements were spontaneous, *State v. Platt,* 130 Ariz. 570, 637 P.2d 1073 (App. Div. 2, 1981) or that defendant initiated the new contact, *State v. Piatt,* 132 Ariz. 145, 644 P.2d 881 (1982); *State v. Woratzeck,* 130 Ariz. 499, 637 P.2d 301 (App. Div. 2 1981).

V. SIXTH AMENDMENT RIGHT TO COUNSEL

A. Right To Counsel At Critical Stages

"During perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during the period as at the trial itself." *Powell v. Alabama,* 287 U.S. 45, 57, 53 S.Ct. 55, 59 (1932), as quoted in *Massiah v. United States,* 377 U.S. 201, 205, 84 S.Ct. 1199, 1202 (1964); *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477 (1985). Footnote 7 in *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880 (1981) indicates when adversary judicial proceedings begin may still be an open question.

The right to counsel attaches "at or after the time that judicial proceedings have been initiated." *State v. Martinez*, 221 Ariz. 383, 386, 212 P.3d 75, 78 (App. Div. 2 2009), citing *Fellers v. United States,* 540 U.S. 519, 523, 124 S.Ct. 1019 (2004). In *Martinez*, the parties did not dispute that the right attached upon the state's filing of an interim complaint after the defendant's arrest.

Although at the latest, the right to counsel attaches at the indictment. *State v. Hall,* 129 Ariz. 589, 592, 633 P.2d 398, 401 (1981), Arizona does not have to appoint counsel for defendants who are in custody in another state. *See State v. Loyd,* 126 Ariz. 364, 365, 616 P.2d 39, 40 (1980); *State v. Gretzler,* 126 Ariz. 60, 83, 612 P.2d 1023, 1046 (1980).

B. The Massiah Rule

"[T]he clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." *Brewer v. Williams,* 430 U.S. 395, 401, 97 S.Ct. 1232, 1240 (1977).

In *Massiah v. United States,* 377 U.S. 201, 205-06, 84 S.Ct. 1199, 1202-03 (1964), an informant engaged the defendant in a conversation about the crime after the defendant had been indicted and was represented by counsel. The United States Supreme Court reversed the defendant's conviction:

> Here we deal not with a state court conviction, but with a federal case, where the specific guarantee of the Sixth Amendment directly applies. We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.

Massiah does not apply where there is no interrogation, even if the authorities put an informant in defendant's cell with instructions to just listen. *Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135 (1986).

1. Agency Relationship between the Informant and the State

In the court's analysis of whether the government deliberately elicited information, an important factor is an agency relationship between the informant and the State.

Defendant, under arrest for multiple murders and assaults, wrote incriminating notes to a fellow prisoner. Defendant had been placed in a cell next to the prisoner, who was a prior county informant. The prosecutor testified he did not employ the informant as an agent to get information from defendant. However, after the informant turned over the notes, his sentence was reduced and he was resentenced to time served and released. The court found an agency relationship between the informant and the State: "In our opinion, the conclusion is inescapable in this case that Mahan [informant] expected some benefit to accrue from his assisting the State and in view of the past dealings of Mahan with the County Attorney based upon a favor done for a favor received, that the State intended to reciprodate for such assistance." *State v. Smith,* 107 Ariz. 100, 104, 482 P.2d 863, 867 (1971).

In S*tate v. Spoon,* 137 Ariz. 105, 108-09, 669 P.2d 83, 86-87 (1983), the court found an agency relationship between the California probation officer and the state, where Arizona detectives asked the probation officer to secure consent for a polygraph. California detention officers refused to talk to the defendant because he had invoked his right to counsel. The defendant's subsequent confession was suppressed and the conviction reversed.

2. Circumstances under which the Court did not find an Agency Relationship

Defendant made incriminating statements to cellmate "almost immediately" after being placed in the cell. Cellmate told his attorney who negotiated a "free talk" with investigators for a plea deal. Within a week after the free talk, the cellmate was moved to a new cell. The court found the cell mate was not an agent of the state. *State v. Martinez*, 221 Ariz. 383, 386, 212 P.3d 75, 78 (App. Div. 2 2009).

Cellmate was not considered an agent of the police where incriminating statements were made to the cellmate before he contacted the police. *State v. Stevens*, 158 Ariz. 595, 597, 764 P.2d 724, 726 (1988).

Where the informant initiated contact with the police without any tangible promise of pecuniary gain or prospect of release from prison coupled with no concerted actions on the part of the police to prime the informant as a witness against defendant at trial, there was no agency relationship. Jail conversations were admissible. *State v. Schad,* 129 Ariz. 557, 564, 633 P.2d 366, 373 (1981).

The defendant, in jail for two murders, made incriminating statements to inmates in his cell and in an adjoining cell. The court found no evidence that the inmates were deliberately placed next to defendant or that they were given instruction by the State to gather information. "They [inmates] were not agents of the State. They simply reported what Jensen freely volunteered to them." *State v. Jensen,* 111 Ariz. 408, 412, 531 P.2d 531, 535 (1975).

Police twice turned down a jail inmate's offer to report the defendant's conversations. When the inmate persisted in talking to the defendant on his own, police gave the inmate a lie detector test and then took his statement. The Department of Corrections agreed to carry out the police plan to imprison the inmate outside the State for his protection. The court found that the trial court had sufficient evidence to conclude that the

inmate was not an agent of the State. *State v. Ferrari,* 112 Ariz. 324, 331, 541 P.2d 921, 928 (1975).

C. Interrogation On A Different Charge When No Warnings Are Given

In *State v. Routhier,* 137 Ariz. 90, 97-98, 669 P.2d 68, 75-76 (1983), the court concluded that a defendant in custody may not be interrogated on any matter after he has invoked his right to counsel unless the attorney is present or the defendant waives his right to counsel. However, officers need not contact the attorney before interrogating an in-custody defendant on other charges, as long as they give defendant *Miranda* and he validly waives his rights. The *Miranda* waiver waives the right to counsel. *See generally Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477 (1985).

An officer may speak to a represented defendant without warning him about an offense with which he has not been charged (unless, of course, the defendant is in custody in which case, he has a Fifth Amendment Right to his warnings).

Officers who had previously arrested the defendant for armed robbery stopped him briefly on a street corner. They showed the defendant a photo and asked if he had seen the person shown, but the defendant said he didn't know the person (his girlfriend, whom police were looking for). No *Miranda* warnings were given. Officers knew the defendant was represented by an attorney for armed robbery. Defendant claimed a Sixth Amendment violation in his appeal of a conviction for being an accessory to armed robbery. The court found the brief questioning to be non-custodial. It distinguished the case from *Massiah* because "they were not even investigating appellant's participation in the armed robbery offense. Further, the statements obtained were not used in appellant's trial for the armed robbery charges, but rather in a trial for a completely different offense." *State v. Hill,* 26 Ariz.App. 37, 39-40, 545 P.2d 999, 1001-1002 (App. Div. 1 1976); *see Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477 (1985); *State v. Osbond,* 128 Ariz. 76, 78, 623 P.2d 1232, 1234 (1981); *State v. Ahumada,* 125 Ariz. 316, 318, 609 P.2d 586, 588 (App. Div. 2 1980) (*Miranda* invoked on different crime).

D. Waiver Of The Right To Counsel

In *Oregon v. Bradshaw,* 462 U.S. 1039, 1046, 103 S.Ct. 2830, 2835 (1983), the Supreme Court held that "after an accused asks for counsel, subsequent statements made without benefit of counsel are admissible if the accused 'initiates' the dialogue." Statements made by an accused that "represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation" will satisfy the initiation requirement. A defendant's statement made after initiation is voluntary.

To determine whether a suspect has waived his right to counsel, the court must use the knowing and intelligent standard set forth in *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019 (1938). State v. James, 141 Ariz. 141, 145, 685 P.2d 1293, 1297 (1984), cert. denied 105 S.Ct. 398. *See also State v. Burns,* 142 Ariz. 531, 691 P.2d 297 (1984).

1. Unnecessary to Notify Counsel

"An accused may waive the presence of counsel and law enforcement officers may question him without notifying counsel … but the State bears a heavy burden of proving the voluntariness of the later waiver and any statements made." *State v. Steelman,* 120 Ariz. 301, 310, 585 P.2d 1213, 1222 (1978).

The court refuses to adopt the New York rule which requires that counsel for a defendant be contacted before a valid waiver can be made. "Law enforcement officers are not under a constitutional duty to contact a lawyer for the accused if he makes a voluntary waiver." *State v. Clabourne,* 142 Ariz. 335, 341-42, 690 P.2d 54, 60-61 (1984).

2. Burden on the State

a. Heavy Burden

"Where incriminating statements are made in response to questioning outside the presence of counsel, and without counsel's permission, the prosecution has a heavy burden of showing that the defendant acted knowingly and voluntarily in waiving his rights." *State v. Moore,* 27 Ariz.App. 275, 279, 554 P.2d 642, 646 (App. Div. 1 1976) (after appointment of counsel), citing *State v. Richmond*, 23 Ariz.App. 342, 533 P.2d 553 (1975). The burden is a preponderance of the evidence. *State v. Thomas,* 148 Ariz. 225, 714 P.2d 395 (1986).

b. Later Waiver

Once the defendant has asserted his right to counsel, he can later waive this right, but the "State bears a heavy burden of proving the voluntariness of the later waiver." *State v. Steelman,* 120 Ariz. 301, 310, 585 P.2d 1213, 1222 (1978). The State must also prove the waiver is an intelligent waiver of a known right, made after defendant had counsel available to him, *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880 (1981).

3. Circumstances Under Which the Court Found a Waiver

See the cases already cited.

Defendant asked for an attorney during interrogation. The detective did not stop the interrogation, but asked the defendant to tell him the facts. Defendant hesitated, said he did not need an attorney, then changed his mind and asked for an attorney a second time. The detective went to the door where another detective asked "did he tell you where the body is?" The detective and defendant responded simultaneously. The detective said defendant had asked for an attorney; defendant said he would tell them where the body was. Defendant's statement was voluntary and his waiver knowing and intelligent. The statements and all evidence were properly admitted. *State v. James,* 141 Ariz. 141, 144-46, 685 P.2d 1293, 1296-98 (1984), cert. denied 105 S.Ct. 398.

Defendant insisted he was deprived of his right to counsel because he did not understand that he was entitled to counsel without cost. Defendant claimed to have been forced to pay for previously appointed counsel. Defendant was orally told that an attorney would be provided without charge. The statements were voluntary and admissible and defendant failed in his burden of showing clear and manifest error in the ruling. *State v. Miller,* 135 Ariz. 8, 14, 658 P.2d 808, 814 (App. Div. 1 1982).

Defendant did not assert his right to counsel by asking, "Who would be a good attorney?" Defendant admitted in later testimony that the question of whether he asked for an attorney was "'left pretty much up in the air.'" *State v. Linden,* 136 Ariz. 129, 134, 664 P.2d 673, 678 (App. Div. 1 1983).

Officers arrested the defendant in a holding tank while defendant was in custody for two unrelated murder charges upon which a public defender was representing the defendant. After reading the defendant his *Miranda* rights, the officers recorded the defendant's statement. The officers did not ask the defendant if he wished to contact the public defender already retained and did not try to contact the attorney. The court affirmed the admission of the defendant's statements: "Officers are not under a constitutional duty to contact a lawyer for the accused if he makes a valid waiver of that right." *State v. Richmond,* 114 Ariz. 186, 190-91, 560 P.2d 41, 45-46 (1976).

The defendant, who was represented by a public defender, was in jail. A detective came to defendant and said he wanted to rap. After a friendly conversation about defendant's personal problems, the detective read defendant his *Miranda* rights. The detective also said he wanted to hear the defendant's version of the story. The court, which found a waiver, emphasized that the detective secured the waiver after giving defendant his *Miranda* rights. The court pointed out that defendant did not claim that the friendly conversation induced his waiver. *State v. Jones,* 119 Ariz. 555, 557, 582 P.2d 645,647 (App. Div. 2 1978).

4. When the Court Did Not Find a Waiver

Defendant was repeatedly interrogated by officers after his request for counsel and after invoking his right to remain silent. Some of the questions involved a second crime with which the defendant was not charged, but the two crimes were "inextricably related." Since *Miranda* protections extend to "'not only express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect,'" these interrogations were clearly prohibited by the constitution. The confessions and the evidence discovered through them were suppressed. *State v. Hensley,* 137 Ariz. 80, 86-87, 669 P.2d 58, 64-65 (1983).

The "Christian Burial" Case: The defendant surrendered to police in Davenport, Iowa, for the murder of a child in Des Moines. Defendant was following the advice of his Des Moines lawyer, who told the defendant not to talk to the officers who would transport him to Des Moines. The officers agreed with the lawyer's demand that they not interrogate the defendant on the trip. In Davenport, another lawyer talked with the defendant at his arraignment, advised the defendant not to talk with officers on the trip to Des Moines, and asked to accompany the defendant on the trip, but was turned down. On the trip, an officer, without giving the defendant his *Miranda* rights, talked about the need to locate the victim's body to give it a Christian burial. Defendant led officers to the body. The United States Supreme Court affirmed the district court's finding that defendant was entitled to a new trial because the State failed to show waiver: "[Defendant's] consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right." *Brewer v. Williams,* 430 U.S. 391, 97 S.Ct. 1232 (1977). (P.S. They let the body in under the inevitable discovery doctrine.)

Defendant asked to speak to an attorney, attempted to call his attorney, but could not reach him. The detective continued to question the defendant and obtained a confession. The state claimed the continued questioning was simply an attempt to clear up an equivocal assertion. The court did not believe an inability to reach counsel was a waiver. The statement and consent to search later obtained by the officer were suppressed as involuntary. *State v. King,* 140 Ariz. 602, 603-04, 684 P.2d 174, 175-76 (App. Div. 2 1984).

Defendant said he didn't want to talk to anyone. This statement probably invoked his rights, and the only questioning permissible was to check if defendant was invoking his rights. When police continued questioning him instead, his rights were violated and further statements were suppressed. *State v. Finehout,* 136 Ariz. 226, 230, 665 P.2d 570, 574 (1983).

E. Harmless Error

The defendant was in jail in another county with charges pending in Arizona. After yelling at a guard, the defendant later apologized, saying he yelled because he was under stress from the pending charges against him. The guard asked about the charges, including the ones pending in Arizona and the defendant made incriminating statements. The court found the admission of the statements harmless because the same statements were made to a mental health counselor as well. State v. Thornton, 187 Ariz. 325, 332, 929 P.2d 676, 683 (1996).

The defendant, in jail for lewd and lascivious acts, was approached by a police officer who elicited incriminating statements from the defendant. The officer did not try to contact the public defender that he knew had been appointed. The defendant's statements were brought out in cross-examination of the officer. The court said that the trial court should have suppressed defendant's statements. The error was not reversible, because similar statements by the defendant had already been properly admitted. *State v. Moore,* 27 Ariz.App. 275, 279, 554 P.2d 642,646 (App. Div. 1 1976).

Be careful, there may also be a Fifth Amendment problem (right to remain silent) with asking witnesses what a jailed defendant said in jail about the charges, if he said nothing. *State v. Sanchez,* 130 Ariz. 295, 635 P.2d 1217 (App. Div. 2 1981) (harmless).

F. Conclusions And Discussion Relating To A Defendant's Sixth Amendment Right To Counsel

1. Warn Formally Charged Defendants

If a defendant has been formally charged, he must be warned of his right to counsel, whether or not he is in custody at the time of questioning about the charge by the State or its agents.

2. Warn In Custody Defendants

If the defendant has been charged and is in custody, he must be given his full *Miranda* warnings prior to questioning even if the defendant is being questioned about a different charge.

3. Ethics and Agents

It is unethical for a prosecutor to initially procure the services of an agent or informant to get a statement from defendant after he has been formally charged. (Code of Professional Responsibility EC 7-18 and DR 7-104). The conflict between prosecutor as (executive) police legal adviser and (judicial) lawyer is an interesting problem, as yet unresolved.

4. Counsel, Privileges and Psychiatric Examination

A psychiatric examination is a critical state of the trial. Defendant's right to counsel extends only to having counsel help him formulate his approach. Defendant has no right to have counsel present during the psychiatric examination. *State v. Turrentine,* 152 Ariz. 61, 64, 730 P.2d 238, 241 (App. Div. 2 1986). If the defendant seeks out a psychiatrist to examine him for sanity purposes, then calls the doctor to testify, the defendant is not a treating physician and the doctor-patient privilege does not apply. A.R.S. § 13-4062(4); *State v. Nelson,* 104 Ariz. 52, 54, 448 P.2d 402, 404 (1968), overruled on other grounds, *State v. Pierce*, 108 Ariz. 174, 494 P.2d 696 (1972). If the defendant calls his treating physician, he has waived the privilege, and his statements to the treating physician. *Turrentine, supra*. *State v. Tallabas*, 155 Ariz. 321, 746 P.2d 491 (App. Div. 1 1987) (Division One explicitly agrees with Division Two).

VI. THE EXCLUSIONARY AND DERIVATIVE EVIDENCE RULES

A. Exclusionary Rule

1. Applies to all Involuntary Statements

All statements by a defendant which were given involuntarily are inadmissible at trial even if the defendant takes the stand and commits perjury. *State v. Boggs*, 218 Ariz. 325, 335, 185 P.3d 111, 121 (2008); *State v. Ellison,* 213 Ariz. 116, 127, 140 P.3d 899, 910 (2006); *State v. Denny,* 27 Ariz.App. 354, 555 P.2d 111 (App. Div. 1 1976).

2. Can Impeach with *Miranda* Violations

All statements by the defendant which were given in violation of *Miranda* are admissible for impeachment if the defendant testifies. *Oregon v. Hass,* 420 U.S. 714, 722, 95 S.Ct. 1215, 1221 (1975); *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643 (1971); *State v.* Walker, 138 Ariz. 491, 675 P.2d 1310 (1984).

3. Applies Only Where Purpose is Served

The exclusionary rule should not apply where the deterrent purpose of the rule is not met. *State v. Osbond,* 128 Ariz. 76, 78, 623 P.2d 1232, 1234 (1981). "When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." *Oregon v. Elstad,* 470 U.S. 298, 312, 105 S.Ct. 1285, 1294-95 (1985).

B. The Derivative Evidence Rule ("Fruit of the Poisonous Tree")

The derivative evidence rule requires that evidence which "has been come at" by "exploitation" of an illegal act of law enforcement must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417 (1963). *State v. Hein,* 138 Ariz. 360, 674 P.2d 1358 (1983).

Police caught defendant coming out of a burglarized house. When he refused to lay still on the ground, a later demoted sergeant hit the defendant on the head. Defendant blurted out that all the police had him on was trespass. After he invoked his *Miranda* rights, police officers sought consent. The court held that any statements made after the police brutality were involuntary as a matter of law. Further, after defendant invokes *Miranda,* an attempt to get consent to search is interrogation, and the consent is invalid. *State v. Britain,* 156 Ariz. 384, 752 P.2d 37 (App. Div. 2 1988).

In *State v. Reffitt,* 145 Ariz. 452, 702 P.2d 681 (1985), the court found the defendant's illegal arrest did not taint his voluntary confession. The factors used in determining whether a confession has been purged of the taint of an illegal arrest are:

1. The voluntariness of the confession, as a threshold requirement;

2. The temporal proximity between the illegal arrest and the confession;

3. The presence of intervening circumstances; and particularly,

4. The purpose and flagrancy of official misconduct.

Id. at 145 Ariz. 458, 702 P.2d at 687. *See also State v. Solano*, 187 Ariz. 512, 930 P.2d 1315 (App. Div. 1 1996).

"[T]he question of whether an illegal arrest occurred and the subsequent implications for admissibility are mixed questions of fact and law dissimilar from the question of voluntariness." In determining the standard of review in such questions, the court will grant great deference to the factual findings of the lower court, but will "look over the trial court's shoulder" in determining the legality of the arrest. Here, the defendant was under arrest following a legal *Terry* stop when she was removed from the street and taken to the courthouse for questioning. Defendant's statements were suppressed and her conviction was reversed because no *Miranda* warnings were given. *State v. Winegar,* 147 Ariz. 440, 444-45, 711 P.2d 579, 583-84 (1985).

In *State v. Ashelmen,* 137 Ariz. 460, 671 P.2d 901 (1983), the Arizona Supreme Court reversed a grand theft conviction, but upheld kidnapping and sexual assault convictions, finding the admission of illegally obtained confessions to be reversible error for the former but harmless error for the latter. The evidence provided by the confessions had a prejudicial effect on the grand theft charge, but were outweighed by overwhelming evidence on the other charges.

The defendant attempted to have his post-arrest statement suppressed as the fruit of an illegal search. The court found the search to be legal and all evidence obtained as a result of the search to be admissible. *State v. Fisher,* 141 Ariz. 227, 686 P.2d 750 (1984).

Remember, the illegality referred to must be something more than failure to give *Miranda*. An unwarned, voluntary statement followed by proper *Miranda* warnings does not taint subsequent voluntary, warned statements. *State v. Montes,* 136 Ariz. 491, 667 P.2d 191 (1983); *State v. Stuck*, 154 Ariz. 16, 739 P.2d 1333 (App. Div. 1 1986) (the defendant unsuccessfully argued that the cat was out of the bag).

1. Independent Source

The essence of a provision forbidding the acquisition of evidence in a certain way . . . does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others. *Wong Sun v. United States, supra.*

The defendant was stopped for speeding and upon determination that the defendant was "wanted" on traffic warrants, he was searched. The defendant was then told that if he had anything on him he should speak up because he'd be strip-searched at the jail anyway. The defendant then produced drugs. Although in violation of *Miranda,* the drugs were admissible because they would have been found at the jail. *State v. Michelena,* 115 Ariz. 109, 563 P.2d 908 (App. Div. 2 1977).

One officer illegally listened in on an extension to a telephone conversation between the defendant and his wife after the defendant was in custody. An officer in the room with the defendant heard the same conversation and, therefore, the statement was admissible. *State v. Ford,* 108 Ariz. 404, 499 P.2d 699 (1972).

2. Attenuation

If there is "attenuation" between an illegally obtained statement and the resultant evidence obtained, the latter evidence will be admissible. *State v. Hein,* 138 Ariz. 360, 674 P.2d 1358 (1983). In *Hein*, the officer asked the defendant where his gun was before reading him his *Miranda* rights. The defendant told the officer it was in his car. Another officer then read the defendant his *Miranda* rights and the question was repeated. Defendant told the officers the exact location of the gun. The court concluded that the defendant's post-*Miranda* statement should not have been admitted at trial because the second question and answer "were too closely related to [the] officer's pre-*Miranda* questioning ... to conclude they were not the exploitation of that original improper act." *Id*. at 365, 674 P.2dat 1363. See generally State v. Reffitt, 145 Ariz. 452, 702 P.2d 681 (1985). State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981).

> Where a Fourth Amendment violation 'taints' the confession, a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted in evidence. Beyond this, the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation.

Oregon v. Elstad, 470 U.S. 298, 306, 105 S.Ct. 1285, 1291 (1985) (internal citations omitted). In this case, the defendant was warned and gave a voluntary statement. The voluntary statement was not tainted and was admissible.

When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear whether that coercion has carried over into the second confession. *Id.* at 310, 105 S.Ct. at 1293.

In *Elstad,* the Supreme Court distinguished between the "lingering compulsion" of a voluntary, unwarned statement and an involuntary, unwarned statement.

> [E]ndowing the psychological effects of voluntary unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions.

Id. at 1294.

In *State v. Steelman,* 120 Ariz. 301, 311, 585 P.2d 1213, 1223 (1978), the officer obtained arguably inadmissible statements. Later, the defendant stated that he wanted to talk to certain detectives again. When the detectives arrived, the defendant gave statements. In rejecting "the cat's out of the bag" argument, the court found that the "definite break" between the prior statements and the defendant's request to talk to officers was sufficient attenuation.

In *State v. Ashelmen,* 137 Ariz. 460, 671 P.2d 901 (1983), the defendant made a statement in response to the detective's mention that the victim was having difficulty with her insurance company because her car could not be located. The detective continued the conversation after the defendant invoked his right to counsel. The Arizona Supreme Court ruled that once the defendant "let the cat out of the bag by implicating himself in the theft of the car, nothing occurred which would attenuate the effects of an involuntary confession," (i.e., defendant did not have access to counsel, he did not know his earlier statement would be inadmissible in court). "Four days of sitting in a jail cell without the advice of counsel will not attenuate the effects of an involuntary confession." *Id*. at 464, 671 P.2d at 905.

Police officers illegally arrested defendant and took him to the station. When he initially refused to confess, the officers lied and told the defendant his fingerprints had been found at the scene. Giving defendant *Miranda* three times did not purge the taint of the illegal arrest. *Taylor v. Alabama,* 457 U.S. 687, 690, 102 S.Ct. 2664, 2667 (1982).

3. The Effect of the Exploitation of an Illegally Obtained Statement in Procuring A Witness' Testimony

In *Wonq Sun, supra,* the Supreme Court stated that there was no difference between derivative physical and verbal evidence obtained illegally. However, in *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054 (1978), the Court reversed this portion of *Wonq Sun*, holding that the exploitation of the prior illegality resulting in the testimony of a State's witness is not proper justification for suppression of the witness' testimony. The court relied upon the intervening free will of a live witness and the lack of deterrent value.

"The principles of *Ceccolini* have evolved into a four-factor test to be used to determine the admissibility of tainted live-witness testimony: (1) the willingness of the witness to testify; (2) the role played by the illegally seized evidence in gaining the witness' cooperation; (3) the proximity between the illegal behavior, the witness' decision to cooperate and the actual testimony at trial; and (4) the police motivation in conducting the search." *State v. Bravo*, 158 Ariz. 364, 373, 762 P.2d 1318, 1327 (1988).

After apprehension, the defendant gave an arguably illegally-obtained statement in which he supplied an alibi witness. The alibi witness was contacted and gave testimony at trial incriminating the defendant. The Supreme Court ruled that the possible illegality had no bearing on the alibi witness' testimony and was admissible. *Michigan v. Tucker,* 417 U.S. 433, 94 S.Ct. 2357 (1974).

4. Prior Testimony After Appellate Suppression of Pretrial Statements

In *Harrison v. United States,* 392 U.S. 219, 88 S.Ct. 2008 (1968), the Court ruled that if a defendant was forced to testify in order to rebut an illegally-obtained statement which the trial court mistakenly admitted, the testimony is inadmissible at future trials. Ceccolini and Tucker, supra, appear to somewhat limit *Harrison*. *See State ex rel LaSota v. Corcoran,* 119 Ariz. 573, 580-82, 583 P.2d 229, 236-38 (1978) for a discussion of *Harrison* and distinguishable facts.

> Statements obtained in violation of the *Miranda* rule may be given by the defendant in the case provided the statements were obtained without violation of the traditional standards for evaluating voluntariness and trustworthiness. The jury must be instructed by the trial court that the statement of defendant may be considered only as it bears on the credibility of the defendant and not as proof of guilt.

State v. Walker, 138 Ariz. 491, 495, 675 P.2d 1310, 1314 (1984) (internal citations omitted).

5. Standing to Object to Statements Obtained Illegally from Another

Standing is a "dead" issue today. The new test is whether defendant has a reasonable expectation of privacy. *See generally State v. Johnson*, 132 Ariz. 5, 643 P.2d 708 (App. Div. 1 1982). For a discussion of the prior

law on the standing question, see *State v. Porter,* 26 Ariz.App. 585, 550 P.2d 253 (App. Div. 1 1976) (defendant lacked standing to object to violation of co-defendant's rights).

VII. SOME ISSUES AT TRIAL

A. Corpus Delicti Necessary To Get A Defendant's Statement Admitted

Before a confession may be admitted, the state must produce sufficient, independent evidence, apart from the confession, to support a reasonable inference that the crime charged was actually committed by someone. *State v. Sarullo, 219 Ariz. 431, 199 P.3d 686* (App. Div. 2 2008), citing *State v. Rubiano,* 214 Ariz. 184, ¶ 6, 150 P.3d 271, 272-73 (App. Div. 2 2007); State *v. May,* 137 Ariz. 183, 669 P.2d 616 (App. Div. 1 1983).

The *corpus delicti* does not have to be established beyond a reasonable doubt in order to admit a defendant's statements. It is sufficient if the facts warrant a reasonable inference that the crime was committed. *State v. Gillies,* 135 Ariz. 500, 506, 662 P.2d 1007, 1013 (1983).

The state must show by reasonable inference that a crime was committed and that someone is responsible for the crime. "[T]here must be a basic injury and a showing that this injury was the result of a criminal, rather than a natural or accidental, cause." *State v. Jones ex rel. County of Maricopa,* 198 Ariz. 18, 22, 6 P.3d 323, 327 (App. Div. 1 2000). See also *State v. Gerlaugh,* 134 Ariz. 164, 170, 654 P.2d 800, 806 (1982); *State v. Hernandez,* 83 Ariz. 279, 320 P.2d 467 (1953); *State v. Hanker,* 98 Ariz. 104, 402 P.2d 418 (1965); *State v. Hinkle*, 26 Ariz.App. 561, 550 P.2d 115 (App. Div. 2 1976); *State v. Turrubiates,* 25 Ariz.App. 234, 542 P.2d 427 (App. Div. 2 1975).

Caution: "The failure of the defendant to object to the introduction of his statements when they are offered does not waive his right to question their admissibility for the purpose of proving *corpus delicti*. A defendant might not object at the time the statements are offered on the theory the state will prove *corpus delicti* before resting its case." The issue will be preserved for appeal. *State v. Gillies*, 135 Ariz. 500, 505-06, 662 P.2d 1007, 1013 (1983).

The defense may try to make you establish the *corpus delicti* for a charge of conspiracy as well as the *corpus delicti* for the underlying crime. The court rejected the reasoning in this case. *State v. Bishop,* 137 Ariz. 361, 364, 670 P.2d 1185, 1188 (App. Div. 2 1983)

B. Establishing the Foundation that Miranda Rights were Read

Although the preferred method for establishing the foundation that *Miranda* rights were read is to read the rights from a rights card into the record, this is not the exclusive manner for establishing such a foundation. *State v. Griffin,* 148 Ariz. 82, 85, 713 P.2d 283, 286 (1986); *State v. Rivera,* 152 Ariz. 507, 733 P.2d 1090 (1987). If the officer tries to testify from memory, make him read the card he read to the defendant, or you court the possibility of a reversal. *State v. Brydges,* 134 Ariz. 59, 63, 653 P.2d 707, 711 (App. Div. 1 1982).

C. Commenting Upon The Defendant's Pretrial Silence

1. Can't Comment on Silence

Neither an officer nor a prosecutor may comment upon the defendant's silence after he has asserted his rights. *Griffin v. California*, 380 U.S. 609, 612, 85 S.Ct. 1229, 1232 (1965); *State v. Shing,* 109 Ariz. 361, 365, 509 P.2d 698, 702 (1973) (closing argument; fundamental but harmless error here); *State v. Mata,* 125 Ariz. 233, 609 P.2d 48 (1980); *State v. Sorrell,* 132 Ariz. 328, 645 P.2d 1242 (1982) (comment on post-arrest silence is reversible error). Someone needed to hear it again - any reference whatsoever to the defendant's silence following arrest is a serious impropriety and should be scrupulously avoided. *State v. Salcido,* 140 Ariz. 342, 681 P.2d 925 (App. Div. 2 1984). Conviction reversed.

2. Can't Impeach with Silence

Nor may a defendant be impeached by his silence at the scene when he takes the stand and tells his story for the first time. *Doyle v. Ohio,* 426 U.S. 610, 617, 96 S.Ct. 2240, 2244 (1976). Such a comment may be harmless error. *Greer v. Miller,* 483 U.S. 756, 765, 107 S.Ct. 3102, 3109 (1987). In *Jenkins v. Anderson,* 447 U.S. 231, 100 S.Ct. 2124 (1980), the Supreme Court ruled that a defendant's pre-arrest silence may be used to impeach the defendant's credibility because the defendant did not rely on the right to remain silent. Rather, his silence is a "previous failure to state a fact in circumstances in which that fact naturally would have been asserted." *Id*. at 239, 100 S.Ct. at 2129. *See also State v. Villareal,* 126 Ariz. 589, 617 P.2d 541 (App. Div. 2 1980).

Note that the Arizona Supreme Court has interpreted the *Doyle* rule to mean that a defendant cannot be impeached with his post-arrest silence if it "was or could have been in response to *Miranda* warnings." *State v. Henry*, 176 Ariz. 569, 579, 863 P.2d 861, 871 (1993) (emphasis added).

3. Can Say Police Gave *Miranda* Warnings

It is, however, not grounds for a mistrial for an officer to state that he gave the defendant his *Miranda* warnings. *State v. Snowden,* 138 Ariz. 402, 405, 675 P.2d 289, 292 (App. Div. 2 1984), citing *State v. Oppenheimer,* 138 Ariz. 120, 673 P.2d 318 (App. Div. 1 1983); *State v. Mann*, 117 Ariz. 517, 573 P.2d 917 (App. Div. 1 1978); *State v. Moore*, 112 Ariz. 271, 540 P.2d 1252 (1975); *State v. Brown*, 107 Ariz. 252, 485 P.2d 822 (1971).

4. Refusal to Allow Recording

The fact that a defendant refused to be taped after waiving his rights is admissible. *State v. Perry,* 116 Ariz. 40, 48, 567 P.2d 786, 794 (App. Div. 2 1977).

5. Admissions Admissible

A statement which is not an assertion of rights but which is an admission is admissible. *State v. Finn,* 111 Ariz. 271, 275-76, 528 P.2d 615, 619-20 (1974) ("I wouldn't be crazy enough to tell you that.")

6. Impeach with Previous Inconsistent Statement

A defendant who takes the stand and gives a different story than he did upon apprehension may be impeached and his failure to state the trial defense at arrest may be commented upon by the prosecutor. *State v. Raffaele,* 113 Ariz. 259, 262, 550 P.2d 1060, 1064 (1976).

7. Answer Some Questions without Complete Story

A defendant who answers some questions after arrest then tells a "more complete" story at trial may be asked why he didn't tell police the more complete story. (Error to ask why defendant didn't tell the prosecutor and error to argue trial was first anyone heard the new story - but harmless since cumulative.) *State v. Robinson,* 127 Ariz. 324, 327-28, 620 P.2d 703, 706-07 (App. Div. 2 1980), cert. denied 101 S.Ct. 1765.

8. Pre-Arrest Silence

The prosecutor could cross-examine defendant about and argue defendant's pre-arrest silence where defendant waited two weeks before surrendering to police. *State v. Villarreal*, 126 Ariz. 589, 617 P.2d 541 (App. Div. 2 1980). *Accord Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124 (1980).

9. Admission by Silence

When police told defendant he fit the description of a suspected rapist, the defendant made an "admission by

silence." Since it was made to police, it was not admissible at trial. But this "admission" is admissible for impeachment once the defendant takes the stand, because he was not under arrest at the time he made it. *State v. Villarreal,* 126 Ariz. 589, 617 P.2d 541 (App. Div. 2 1980).

The court found no fundamental error where defense counsel failed to object to the state presenting evidence that the defendant voluntarily spoke to police and then, when law enforcement officers declined to remove his handcuffs, refused to make any further statements. State v. Anaya, 170 Ariz. 436, 442, 825 P.2d 961, 967 (App. Div. 2 1991).

10. Invocation - Waiver – Reinvocation

Defendant had invoked his rights, waived them, and later reinvoked them. The only information allowed at trial was that elicited during the period when the waiver was in effect. The prosecutor was permitted to question the defendant about matters on which he spoke prior to reinvoking his rights. However, it was impermissible to ask questions on matters about which the defendant had not made any comment. *State v. Routhier,* 137 Ariz. 90, 96, 669 P.2d 68, 74 (1983).

VIII. INSTRUCTING THE JURY

A. Defense Requests Necessary

The failure of defense counsel to request a jury instruction as to the manner of the defendant's confession is not fundamental error. "However, if the defendant requests the voluntariness question be presented to and decided by the jury as well, the trial court must then give the appropriate instruction." *State v. Cobb,* 115 Ariz. 484, 487-88, 566 P.2d 285, 288-89 (1977).

B. Refusal for Lack of Trial Evidence

Notwithstanding *Cobb, supra,* the Supreme Court in *State v. Williams,* 120 Ariz. 600, 587 P.2d 1177 (1978), approved the trial court's refusal to give a voluntariness instruction. In *Williams*, the defendant, after warnings and waiver made admissions regarding a robbery-murder, then requested an attorney. Officers continued to question Williams anyway. At the voluntariness hearing, the defendant claimed that he had been tricked into confessing. The trial court ruled that all statements prior to defendant's request for an attorney were admissible. The Supreme Court ruled that because the jury was never apprised of the "trickery", the defendant "failed to present any evidence from which the jury could conclude that his statements were involuntary." *Id*. at 602. "Appellant's testimony at the voluntariness hearing . . . does not raise an issue which would entitle him to a requested instruction on voluntariness." *Id.*

No instruction on voluntariness is required where there is no evidence that the defendant's statements were made involuntarily. *State v. Kennedy,* 122 Ariz. 22,25, 592 P.2d 1288, 1291 (App. Div. 2 1979).

C. Must Instruct if Requested

> While due process will be adequately served if the trial judge alone determines the voluntariness of the confessions, it is the defendant's prerogative to present the issue to the jury if he so determines. The trial court must instruct on voluntariness if the evidence has raised a question for the jury.

State v. Linden, 136 Ariz. 129, 137-38, 664 P.2d 673, 681-82 (App. Div. 1 1983).

In *State v. Porter,* 122 Ariz. 453, 454-55, 595 P.2d 998, 999-1000 (1979), the Supreme Court reversed and remanded for refusal of the trial court to instruct on voluntariness where the defendant's statements were admitted to prove that he was not insane.

D. Unnecessary Instruction Regarding *Miranda* and Voluntariness

The court need not instruct the jury about all of the voluntariness factors listed in A.R.S. § 13-3988(B). *State v. Brooks,* 127 Ariz. 130, 138, 618 P.2d 624, 632 (App. Div. 1 1980).

A trial judge need not instruct the jury on whether *Miranda* rights were given in accordance with *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966), as this relates "primarily to the admissibility of a statement or confession rather than the voluntariness of it." *State v. Stone,* 122 Ariz. 304, 311, 594 P.2d 558, 565 (App. Div. 1 1979).

E. Waiver

The failure to instruct jury on what effect it should give to the alleged failure of the police to allow the defendant to contact his attorney during interrogation was not fundamental error. The defendant did not request an instruction on this point. *State v. Brooks,* 127 Ariz. 130, 138, 618 P.2d 624, 632 (App. Div. 1 1980).

F. No Instruction on pre-*Miranda* Statements

There was no error in the court's refusal to instruct the jury that any statement made prior to *Miranda* warnings should be considered involuntary. *State v. Morse,* 127 Ariz. 25, 29, 617 P.2d 1141, 1145 (1980).

IX. ISSUES ON APPEAL

In addition to the substantive issues discussed in this chapter, there are certain legal issues which may be the basis of an appellate court's decision.

A. Duty To Object

The defendant did not raise the issue of voluntariness until the close of evidence. "Inasmuch as appellant had not made a motion to suppress prior to trial, and did not object to the questions at trial, she waived her right to a voluntariness hearing." *State v. Ferguson,* 119 Ariz. 200, 201, 580 P.2d 338, 339 (1978), citing *State v. Finn*, 111 Ariz. 271, 528 P.2d 615 (1974); *State v. McGriff*, 7 Ariz.App. 498, 441 P.2d 264 (1968); Rule 16.1(c). Defendant did not object to incomplete *Miranda* and used the statements, thereby waiving any error. *State v. Brydges,* 134 Ariz. 59, 63, 653 P.2d 707, 711 (App. Div. 1 1982).

The statements can be introduced without a hearing when the defendant so requests. *State v. Fayle,* 134 Ariz. 565, 579-80, 658 P.2d 218, 232-333 (App. Div. 1 1982).

A valid guilty plea waives non-jurisdictional defects, including the involuntariness of the defendant's statements. *State v. Hamilton,* 142 Ariz. 91, 94, 688 P.2d 983, 986 (1984).

CAUTION:

> The failure of the defendant to object to the introduction of his statements when they are offered does not waive his right to question their admissibility for the purposed of proving *corpus delicti*. A defendant might not object at the time the statements are offered on the theory the state will prove *corpus delicti* before resting its case.

The issue will be preserved for appeal. *State v. Gillies,* 135 Ariz. 500, 505-06, 662 P.2d 1007, 1012-13 (1983).

1. Constitutionality

In *Wainwright v. Sykes,* 433 U.S. 72, 86-87, 97 S.Ct. 2497, 2506 (1977), the United States Supreme Court considered a Florida procedural rule that motions to suppress be made prior to trial: “We, therefore, conclude

that Florida procedure did, consistently with the United States Constitution, require that petitioner's confession be challenged at trial or not at all."

2. Trial Court Role

On direct examination of the arresting officer, defense counsel failed to object regarding the voluntariness of a defendant's statements. Counsel objected to foundation and knowing waiver, but did not make a pre-trial motion to suppress and did not ask for a hearing outside the jury's presence. The court found no error, because when neither the evidence nor the defense counsel raise the question of voluntariness, the trial judge is not required *sua sponte* to make a voluntariness determination outside the jury's presence. *State v. Finn,* 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974). *State v. Bishop,* 137 Ariz. 361, 670 P.2d 1185 (App. Div. 2 1985).

B. Standard Upon Appellate Review

1. Clear and Manifest Error

A ruling by the trial judge regarding the admissibility of a confession will not be overturned, absent clear and manifest error. *State v. Rivera*, 152 Ariz. 507, 733 P.2d 1090 (1987); *State v. Griffith*, 148 Ariz. 82, 713 P.2d 283 (1986). *State v. Hein,* 138 Ariz. 360, 674 P.2d 1358 (1983); *State v. Hanson,* 138 Ariz. 296, 674 P.2d 850 (App. Div. 2 1983); *State v. Rodriquez,* 137 Ariz. 168, 669 P.2d 601 (App. Div. 2 1983); *State v. Hensley*, 137 Ariz. 80, 669 P.2d 58 (1983); *State v. Montes*, 136 Ariz. 491, 667 P.2d 191 (1983); *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983); *State v. Dalglish*, 131 Ariz. 133, 639 P.2d 323 (1982); *State v. Arnett*, 119 Ariz. 38, 579 P.2d 542 (1978); *State v. Osbond,* 128 Ariz. 76, 623 P.2d 1232 (1981).

2. Substantial Evidence

"If the lower court's determinations [regarding voluntariness] are supported by substantial evidence, they will not be disturbed on appeal." *State v. Ramirez,* 116 Ariz. 259, 266, 569 P.2d 201, 208 (1977); *State v. Rhymes,* 129 Ariz. 56, 628 P.2d 939 (1981); *State v. Natzke,* 25 Ariz.App. 520, 544 P.2d 1121 (App. Div. 1 1976).

3. Trial Court Function

It is the function of the trial court to determine factual disputes to determine voluntariness of confessions; where conflicting inferences can be drawn from the evidence, a reviewing court must view the evidence in the light most favorable to sustaining the trial court findings. *State v. Bishop,* 137 Ariz. 361, 670 P.2d 1185 (App. Div. 2 1983); *State v. Arnett,* 119 Ariz. 38, 579 P.2d 542 (1978); *State v. Natzke,* 25 Ariz.App. 520, 544 P.2d 1121 (App. Div. 1 1976); *State v. Brosie*, 24 Ariz.App. 517, 540 P.2d 136 (App. Div. 2 1975).

C. Harmless Error

The admission of evidence obtained in violation of *Miranda* is subject to a harmless error analysis. *See State v. Hickman*, 205 Ariz. 192, ¶ 29, 68 P.3d 418, 424-25 (2003).

1. Overwhelming Evidence of Guilt

The trial court admitted the defendant's voluntary, incriminating statement to officers that. The court found that, even if it was error to admit the statement, the error was harmless beyond a reasonable doubt due to the "overwhelming" independent evidence of his guilt. *State v. Landrum,* 112 Ariz. 555, 559, 544 P.2d 664, 668 (1976). Where the defendant made statements prior to fleeing the scene of the crime and the attorney used those statements in a self-defense claim, admission of evidence of the same statements made after an incomplete *Miranda* warning was harmless error. *State v. Brydges,* 134 Ariz. 59, 63, 653 P.2d 707, 711 (App. Div. 1 1982).

But see State v. Szpyrka, 220 Ariz. 59, 63, 202 P.3d 524, 528 (App. Div. 2 2008) (admission of defendant's statement was not harmless error where no other evidence was introduced to support certain elements of the

convicted offense).

2. Evidence Presented by Other Witnesses

Although the trial court erred in admitting the defendant's statements, the error was harmless "because the same matters were presented by the testimony of other witnesses." *State v. Doss,* 116 Ariz. 156, 160-61, 568 P.2d 1054, 1058-59 (1977).

3. Prior Oral Confession With no *Miranda* Warnings

"We thus conclude that even if appellant's confession were an emotional response to the thought of alienating the family he loved, it was not, in these circumstances, the product of coercion or other improper tactics." Therefore, defendant's voluntary confession, obtained after an arguably illegal oral confession, was admissible. Admission of the oral confession was at most harmless error. *Bryant v. Vose,* 785 F.2d 364 (1st Cir. 1986).

X. MISCELLANEOUS

A. Polygraphs

Defendant's offer to take a polygraph is inadmissible, notwithstanding the fact the offer was made during his "confession." *State v. Britson,* 130 Ariz. 380, 384, 636 P.2d 628, 632 (1981).

B. Destruction Of Notes On Confession

The fact that an officer destroyed his rough notes about the defendant's confession pursuant to Rule 15.4(a)(2) does not entitle the defendant to suppression of the confession. *State v. Brooks*, 127 Ariz. 130, 135, 618 P.2d 624, 629 (App. Div. 1 1980).

C. Portions of Confession Inadmissible

Voluntary, warned confessions are admissible. Portions of the confession may be inadmissible under the rules of evidence, such as Rule 404(b). The court did not err when it ruled that, if the defendant testified,the tape of the defendant's confession would be admissible, although it contained otherwise inadmissible reference to nine other uncharged robberies. The tape would have been the only real evidence of what happened in a hot voluntariness contest. Likewise, the court did not err when the defendant testified but the court let the state introduce evidence that the defendant denied committing an uncharged robbery. The denial showed that the defendant's will was not overcome, as he alleged. *State v. Cannon,* 148 Ariz. 72, 75-76, 713 P.2d 273, 276-77 (1985).

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